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No.

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the double jeopardy protections of the United States Constitution prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where the defendant persuades the trial court prior to trial, to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

II. Whether the double jeopardy clause of the United States Constitution prohibits the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

III. Whether murder as defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as defined in Ohio Revised Code Section 2903.04 are the same offenses for purposes of the double jeopardy provision precluding multiple punishments for both those offenses.

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No.

In the Supreme Court of the United States

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THE STATE OF OHIO,
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vs.

KENNETH M. JOHNSON,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

To: *The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

OPINIONS OF THE COURT BELOW

The Official Report of the Opinion by the Supreme Court of Ohio affirming the judgment of the Ohio Court of Appeals for the Eleventh District. Appendix at p. A1.

The Judgment Entry and Opinion of the Ohio Court of Appeals for the Eleventh District affirming the judgment of the Court of Common Pleas, Lake County, Ohio. Appendix at p. A14.

The Judgment Entry and Opinion of the Court of Common Pleas, Lake County, Ohio, granting the Defendant's Motion to Dismiss the charges of Murder and Aggravated Robbery. Appendix at p. A21.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on August 31, 1983. No Motion for Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Appendix at p. A26.

(5th Amendment)

(14th Amendment)

Ohio Revised Code, Section 2903.02(A)(B) Murder

Ohio Revised Code, Section 2903.04(B)(C) Involuntary Manslaughter

Ohio Revised Code, Section 2911.01(A)(B) Aggravated Robbery

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Ohio Revised Code, Section 2967.191 Reduction of Minimum and Maximum Sentence

STATEMENT OF THE CASE

In the early morning hours of January 25th, 1983, one Thomas Hill was shot to death at his apartment in the City of Mentor-on-the-Lake, Lake County, Ohio. At the time of the killing of Thomas Hill several items of his personal property were stolen from his apartment.

The Defendant-Respondent and two Co-Defendants were arrested in connection with the slaying less than twelve hours later. A preliminary hearing was held within five days of those arrests in the Mentor Municipal Court, and due to a City Prosecutor's error, all charges were dismissed against the Defendant-Respondent and his bond was released.

On February 13, 1979, the Lake County Grand Jury found probable cause existed to believe that the Defendant-Respondent had violated four separate criminal statutes and returned a single Secret Indictment charging the Defendant-Respondent with one count of Murder in violation of Ohio Revised Code Section 2903.02(A), one count of Involuntary Manslaughter in violation of Ohio Revised Code Section 2903.04(B), one count of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01(A)(1), and one count of Grand Theft in violation of Ohio Revised Code Section 2913.02(A)(1), in Case No. 79-CR-048.

Prior to the action of the Grand Jury the Defendant-Respondent absented himself from the jurisdiction of Lake County and it was not until nearly two years after Thomas Hill's death that he was arrested in the State of Tennessee. Upon his apprehension and return to Ohio, the Defendant-Respondent was brought before a Lake County Common Pleas Judge for purposes of arraignment on October 9,

1980. At that hearing the Defendant-Respondent proffered "Guilty" pleas to the charges of Involuntary Manslaughter and Grand Theft and "Not Guilty" pleas to the charges of Murder and Aggravated Robbery. The State of Ohio objected to the proffer of the guilty pleas and the arraigning judge reserved ruling on whether or not he was obligated to accept the pleas. Bond was set in the matter and the case was subsequently assigned to the trial court. The trial court was faced with the issue of whether or not it should accept the proffered guilty pleas to the lesser offenses.

Following written arguments by both sides and over the vehement objections of the State of Ohio, the Defendant-Respondent, at a hearing on November 26, 1980, persuaded the trial court to exercise its discretion in favor of accepting his guilty pleas to the lesser indicted offenses of Involuntary Manslaughter and Grand Theft. The Court then sentenced Defendant-Respondent to three to ten years on the Involuntary Manslaughter count and two to five years on the Grand Theft count with those sentences to run consecutively.

Following those pleas the Defendant-Respondent moved to dismiss the remaining counts of Murder and Grand Theft on Double Jeopardy grounds arguing continued prosecution amounted to multiple prosecutions for the same offense and invoking the doctrine of collateral estoppel. The trial court granted the Motion to Dismiss following briefs and arguments in its Judgment Entry and Opinion of March 31, 1981 (See Appendix at p. A21).

Thereupon the State of Ohio filed an appeal of the trial court's dismissal of the remaining counts with the Court of Appeals of Ohio, Eleventh District, Lake County, Case No. 8-221. The State Court of Appeals, in its Judg-

ment Entry and Opinion of April 1, 1982, affirmed the trial court's dismissal of the counts in the indictment charging Murder and Aggravated Robbery (See Appendix at p. A14).

The Supreme Court of Ohio affirmed the decisions of the Court of Appeals on August 31, 1983, in Case No. 82-657, and found that Aggravated Robbery and Grand Theft were allied offenses of similar import pursuant to Ohio Revised Code Section 2941.25(A) and that since Murder and Involuntary Manslaughter share the common element of causing the death of another and are distinguishable only by the defendant's mental state, the defendant, in any single killing could only be convicted of one offense or the other but not both. In so finding the Court held that in this case the Double Jeopardy provision prohibiting multiple punishments for the same offense would be violated by further prosecution of the Defendant-Respondent (See Appendix at p. A1).

ARGUMENTS RELIED UPON FOR ALLOWANCE OF WRIT

I. The double jeopardy protections of the United States Constitution do not prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where that defendant persuades the trial court to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

The issues presented in this case involve substantial constitutional questions as well as being of great general and public importance.

The State of Ohio has a legitimate interest in seeing that any and all issues involving criminal conduct are resolved in one proceeding and that criminal conduct is fully punished. This is particularly the case where a Grand Jury has determined that probable cause exists to believe that the conduct of a defendant has resulted in the violation of several statutes and those violations have been presented for consideration in a single indictment.

The issues presented in the case at bar have a significance to American jurisprudence far beyond the individual rights of this Defendant-Respondent. Especially since, as will be argued later, the Defendant-Respondent has had no constitutionally guaranteed rights violated by the State of Ohio. But rather, the Defendant-Respondent has, through an errant trial court's abuse of discretion, been allowed to plead guilty to the crimes of his choice, raise the spector of

the Double Jeopardy Provision, and thereby deprive the people of Ohio their right to have the issues raised in the Indictment litigated and resolved before a court of law.

This is a radical and, indeed, a sinister departure for the Courts of the United States. The hallmark and foundation of the American system of jurisprudence has been its unswerving adherence to the belief that both parties to a legal action should be dealt with equitably, and that both sides should have an equal and fair opportunity to present the facts to a finder of fact, be it Judge or jury. In past criminal cases the people were deprived of that right to present facts only when they had violated some constitutionally or statutorily guaranteed rights of the Defendant. In those cases, the Courts have ruled, the concepts of equity and fairness to both parties has mandated that the State be deprived of the right to proceed, in part or whole, with the factual issues. In other words when certain evidence, whether crucial or peripheral, was suppressed.

In the case at bar, however, the State of Ohio has not violated the Defendant-Respondent's rights in any way. It brought the facts before a Grand Jury which duly, and legally, indicted the Defendant-Respondent for several separate crimes involving the same factual issues. The State of Ohio has, throughout these proceedings, attempted, indeed begged, to be able to present the facts of this case in a single proceeding. It has been the Defendant-Respondent who has made every effort to separate and bifurcate these proceedings. If the Defendant-Respondent is allowed to do this, he will have successfully evaded the just prosecution of his criminal acts, deprived the people of Ohio of their rights and, more importantly, laid the groundwork for future Defendants to similarly thwart justice.

The most frustrating and frightening factor of the Ohio Supreme Court's decision is that it so clearly ignores and contradicts the established case law. It has been long established that people have a right to present the factual issues of their case to a finder of fact. *United States v. Gray*, 448 F.2d 164 (1971); *Singer v. United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965). Furthermore, there is abundant case law which establishes that the Defendant does not have a constitutionally guaranteed right to demand that a Court accept his guilty plea. *Alford v. North Carolina*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Longfellow v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (9th Cir., 1971); *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962); *United States v. Biscoe*, 518 F.2d 95 (1st Cir., 1975); *Bailey v. Rose*, 378 F. Supp. 227 (E.D. Tenn., 1974); *Green v. United States*, 40 App. D.C. 426, 46 LRA, NS, 1117 (C.A., D.C., 1913); *United States v. Willis*, 75 F. Supp. 628 (D.C., D.C., 1948).

This Defendant-Respondent has obviously sought to distort the law in an effort to avoid the prosecution of his crimes. He was allowed to plead guilty over the objections of the people. Following his plea of guilty, he attempted to, and may succeed in, using the Double Jeopardy Provisions of the Sixth Amendment in an unprecedented manner. A manner which protects the Defendant-Respondent but in the process denies the people of their right to a trial.

The Supreme Court for the State of Ohio has determined that where a Defendant persuades a trial court to accept his guilty pleas to lesser indicted offenses, the prohibition against imposing multiple punishments for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), precludes the State

from proceeding any further in trying to have the issues of the Defendant-Respondent's culpability fully resolved by a trier of fact, in one judicial inquiry.

In so holding, the Supreme Court of Ohio has misapplied the holdings of this Court in *Pearce, supra,* and its progeny with regard to what constitutes a violation of the Double Jeopardy prohibition against imposing multiple sentences for the same offenses.

The holding of this Court in *Pearce, supra,* does not bar the State from continuing its single prosecution of the Defendant-Respondent. Assuming arguendo, that the counts of the indictment pleaded to by the Defendant-Respondent are the same offenses as the remaining counts, pursuant to *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), then the trial court would be precluded from further sentencing upon conviction, without giving credit for time served for the lesser offenses pursuant to Ohio Revised Code Section 2967.191. Further, Ohio Revised Code Section 2953.21 would permit the trial court to vacate the judgments of conviction for the lesser offenses thus preventing the Defendant-Respondent from multiple convictions and punishments.

As this Court has held, the constitutional prohibition against imposing multiple punishments does not preclude a continuation of the Defendant-Respondent's criminal proceeding, but only requires that "punishment already exacted be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Pearce, supra,* at 718, 719.

It should also be noted that the multiple punishment provision of the Double Jeopardy Clause prohibits only cumulative or consecutive sentencing for the same offenses and does not preclude sentencing which in the aggregate

does not exceed the maximum allowable for the greater offense where separate sentencing is necessitated by the Defendant's own actions. *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). Thus upon the continuation of the Defendant-Respondent's criminal proceeding to conviction of the greater offenses, the trial court's sentencing to concurrent terms of imprisonment pursuant to Ohio Revised Code Section 2929.41 would be perfectly within any constitutional limitations upon multiple punishments for the same offense.

Thus, it is clear that the Supreme Court of Ohio erred in its application of the prohibition against multiple punishments for the same offenses enunciated in *Pearce, supra,* in the case at bar. The State of Ohio should be permitted to continue its prosecution of the Defendant-Respondent on the charges of Murder, notwithstanding his guilty plea to Involuntary Manslaughter. Further, the State of Ohio should be permitted to continue is prosecution of Defendant-Respondent for Aggravated Robbery even though the Supreme Court of Ohio has held that Grand Theft is an "allied offense of similar import" of Aggravated Robbery pursuant to Ohio Revised Code Section 2941.25. That statute is a statutory embodiment of the federal double jeopardy guarantees; however, the lower court erroneously held that the prohibition against imposing multiple sentences for the same offenses under *Pearce, supra,* precludes continued prosecution on the charge of Aggravated Robbery.

II. The double jeopardy clause of the United States Constitution does not prohibit the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

In the case at bar the Lake County Grand Jury indicted the Defendant-Respondent in a single, multiple count indictment charging the offenses of Murder, Involuntary Manslaughter, Aggravated Robbery and Grand Theft. These charges were presented to the trial court under Case No. 79-CR-048. At his initial appearance, the Defendant-Respondent proffered Guilty pleas to Involuntary Manslaughter and Grand Theft and Not Guilty pleas to the offenses of Murder and Grand Theft. The State of Ohio asked the trial court not to accept the Defendant-Respondent's Guilty pleas in an attempt to have all issues resolved in one proceeding. After having briefs and argument submitted to the Court, the Defendant-Respondent persuaded the trial court to accept his Guilty pleas to the lesser offenses, over the State's vehement objections.

This situation is on all fours with the situation this Court faced in deciding *Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). In that case a Defendant had opposed the Government's attempt to consolidate separate indictments charging arguably greater and lesser included offenses. There, as in the instant case, the Defendant was responsible for thwarting the Government's attempt to have the issue of the Defendant's culpability resolved in one proceeding. The Defendant in that case was convicted of the lesser offense and moved to dismiss the indictment charging the greater

offense. That motion was denied by the District Court and the Defendant was convicted of the greater offense.

This Court did not reach the issue of whether the two offenses were the same for Double Jeopardy purposes but held that where the need for separate trials was created solely by the actions of the Defendant, he has deprived himself of any right he may have had to the Double Jeopardy protection of the Fifth Amendment. This Court concluded that the policy behind the Double Jeopardy Clause is not offended by continued prosecution in such a situation. The State of Ohio has engaged in no overreaching in this case or ever attempted to force the Defendant-Respondent to "run the judicial gauntlet" more than once. These are quite clearly the policy reasons behind the Double Jeopardy Clause.

In the case at bar, the State did not attempt to subject this Defendant-Respondent to repeated efforts to secure a conviction. The State merely attempted to present in one judicial proceeding, with one criminal case number, all the offenses for which the Lake County Grand Jury found probable cause to believe had been committed by the Defendant-Respondent. There has been no prosecutorial misconduct or overreaching in this case. To the contrary, the State objected to the trial court's acceptance of the proffered guilty pleas anticipating the Defendant-Respondent's attempt to artificially bifurcate the proceedings so as to wield the Double Jeopardy Clause to carve two prosecutions from what was in reality only one.

The Supreme Court of Ohio stated in the final paragraph of its opinion that the State cannot complain of the problem it created by bringing charges for two offenses where only one conviction was possible. Here the Court ignores the function of a Grand Jury. The Grand Jury's function is to determine whether or not there is sufficient

evidence available to the State to establish that probable cause exists to believe that a criminal offense has occurred and that particular defendant committed that offense. They are given the facts of a case through evidence available to the State. It does not hear evidence known only to the Defendant, but which may be adduced at trial nor is it to weigh the evidence by the same standard as that which a petit jury would apply in a jury trial. Obviously evidence which would support a finding of probable cause may not be sufficient to support a conviction for any offense. That being the case there is absolutely nothing wrong with a Grand Jury finding that probable cause exists under two distinct homicide statutes even though there may be but one victim involved. The question of which offenses the defendant is guilty of, beyond a reasonable doubt, is for a petit jury to decide. The State should not be precluded from a jury determination of the Defendant-Respondent's culpability where the Grand Jury and the State of Ohio sought to have that issue resolved at one time.

The Supreme Court of Ohio in the case at bar has failed to apply *Jeffers, supra,* in a case presenting essentially the same factual situation. Again, it was the action of the Defendant-Respondent in persuading the trial court to accept his Guilty pleas over the State's objections to the lesser offenses which created the multiple punishment problem. Surely the holding of *Jeffers, supra,* demands that the decision of the Ohio Supreme Court be reversed and the State of Ohio be allowed to continue its prosecution of the Defendant-Respondent for the charges of Murder and Aggravated Robbery.

III. Murder as defined in Ohio Revised Code Section 2903.02 and involuntary manslaughter as defined in Ohio Revised Code Section 2903.04 are not the same offenses for purposes of double jeopardy protections where both statutes contain different elements and conviction for either offense would require proof of facts not necessary to sustain conviction on the other.

As this Court has consistently ruled, where the same act or transaction violates two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, for double jeopardy purposes, is whether each statute requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Under Ohio statutes both Murder and Involuntary Manslaughter share the common element of causing the death of another. However, the Murder statute requires proof that the offender acted with a purposeful intention to cause the death of another. The Involuntary Manslaughter statute, under the division with which the Defendant-Respondent was charged requires proof that the death of another was caused as a proximate result of the defendant's commission of a misdemeanor offense. Analysis of these separate and distinct offenses shows that each would require proof of facts not necessary to prove the other offense. Obviously, evidence presented to show that the death of a victim was caused as the proximate result of the defendant's commismission of a misdemeanor would not be sufficient alone to show that the defendant acted with a purposeful intention to cause the death of that victim.

The reverse of that situation is also true. Proof that the defendant purposely caused the death of another would not in and of itself show that the defendant had com-

mitted any misdemeanor, which may have caused the victim's death. To sustain a conviction for Involuntary Manslaughter there is no requirement that the State show that the defendant had any intention whatsoever to cause the death of the victim. This is not the case in order for the State to sustain a conviction for Murder.

Since the elements of Murder require proof of facts and an element different from the proof and elements required to sustain a conviction for Involuntary Manslaughter the two offenses are not the same for purposes of the Double Jeopardy Clause of the United States Constitution as defined under the *Blockburger, supra,* decision.

CONCLUSION

In the case at bar the Defendant-Respondent has persuaded the Ohio Courts to apply the Double Jeopardy Clause of the Fifth Amendment in a manner wholly inconsistent with the holdings of this Court and the time-honored policy factors behind the Double Jeopardy protections. This ruling also contravenes the rights of the State of Ohio as a litigant in this matter. Surely the people of Ohio have the right to have issues of criminal culpability resolved in one proceeding and to extract full punishment for criminal conduct. The State seeks nothing more or less in this matter and has engaged in no misconduct toward the Defendant-Respondent. The Double Jeopardy protection is just that; a protection. It is not an offensive weapon.

The ruling of the Ohio Supreme Court severely hampers the function of Ohio Grand Juries. It has said that you may not issue multiple count indictments containing lesser and greater included offenses, even though you may

find the requisite probable cause for each, without running the risk that those crimes may not be fully prosecuted and punished. It has said further that Grand Juries must now, though laymen, possess the legal acumen of skilled attorneys when handing down indictments where criminal acts violate more than one statute, if crimes are to be fully punished. This undue fettering of the Grand Jury process is without justification in balancing the interests of the people of Ohio and the rights of any particular defendant.

For the foregoing reasons, the decision of the Supreme Court of Ohio must be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

6 Ohio St. 3d 420

Criminal Law: aggravated robbery and theft are allied offenses of similar import; murder and involuntary manslaughter distinguished, how; double jeopardy prohibits conviction of both murder and involuntary manslaughter, when.

1. Aggravated robbery, as defined by R. C. 2911.01, is an "allied offense of similar import" to theft, as defined by R. C. 2913.02. (R. C. 2941.25[A], applied.)

2. The offenses of murder, R. C. 2903.02, and involuntary manslaughter, R. C. 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental state. The prohibition against double jeopardy requires that in any one killing, the offender may be convicted of one or the other of the offenses but not both.

APPEAL From the Court of Appeals for Lake County.

On February 13, 1979, appellee, Kenneth M. Johnson, was indicted by the Lake County Grand Jury for one count each of the offenses of murder, R. C. 2903.02(A), involuntary manslaughter, R. C. 2903.04(B), aggravated robbery, R. C. 2911.01(A)(1), and grand theft, R. C. 2913.02(A)(1). All four charges stemmed from an incident occurring on January 25, 1979, in which Thomas D. Hill was shot to death and several items of personal property were taken from his apartment.

At his arraignment conducted on October 9, 1980, appellee attempted to enter a plea of guilty as to the charges of involuntary manslaughter and theft and not guilty as to the remaining charges. After a series of hearings and, over the objections of the state, the trial court accepted this plea on November 26, 1980. The court thereafter sentenced appellee to serve three to ten years on the involuntary manslaughter count and two to five years on the theft count.

Subsequently, appellee filed a motion to dismiss the charges remaining against him on the basis that his constitutional protection against being placed twice in jeopardy for the same offense would be violated if he were to be tried on the counts of murder and aggravated robbery. Upon consideration, the trial court found this argument to be well-taken and granted the motion to dismiss.

The court of appeals affirmed and the cause is now before this court upon the allowance of a motion for leave to appeal.

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[421] J. P. Celebrezze, J. The Double Jeopardy Clause is contained in the Fifth Amendment to the United States Constitution which provides, in part, "* * * nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb." This prohibition has been held to be applicable to the states by operation of the Fourteenth Amendment. *Benton v. Maryland* (1969), 395 U. S. 784, 794. Moreover, the Ohio Constitution contains a similar protection in Section 10, Article I which states, "* * * [n]o person shall be twice put in jeopardy for the same offense."

It is established that there are three protections offered by the Double Jeopardy Clause to the criminal defendant: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U. S. 711, 717.

It is the state's position that the second of those protections was improperly invoked and applied in this case. In support of this position, the state advances a two-pronged argument. First, it maintains that the offenses of murder and involuntary manslaughter and the offenses of aggravated robbery and theft are not the same for double jeopardy purposes. Second, citing the cases of *Jeffers v. United States* (1977), 432 U. S. 137, and *United States v. Goldman* (C.A. 3, 1965), 352 F. 2d 263, it asserts that the appellee was not subjected to multiple prosecutions in that he was properly charged with all four offenses in a single indictment and that he chose to artificially bifurcate the proceedings by pleading guilty to some of the offenses and not guilty to the others. In summary, the state asserts that a criminal defendant charged with multiple crimes should not be permitted to manipulate the timing of the proceedings in such a manner as to avoid prosecution for the more serious charges by pleading guilty to the lesser offenses and then claiming a double jeopardy bar as to the others.

The state's position rests upon the argument that the essential issue in this case is one of timing. Accordingly, it maintains that were it not for the trial court's erroneous acceptance of a partial guilty plea over prosecutorial objections, the case would have proceeded to trial and the appellee could have been convicted of all four counts of the indictment.

Upon careful consideration of the record below as well as the applicable statutory and case law, we find this position to be untenable. We agree with the appellant that this case does not involve successive prosecutions such as to warrant the application of the collateral estoppel principles set forth in *Ashe v. Swenson* (1970), 397 U. S. 436, and its progeny. Rather, this case concerns the third double jeopardy protection prohibiting multiple punishments for the same offense. In reviewing and applying this protection, it is our conclusion that the appellee could not have been convicted of all the charges against him regardless of the timing of the trial court's acceptance of his pleas.

Where an accused is charged with more than one statutory violation and [422] the double jeopardy prohibition against multiple punishments for the same offense is invoked, the standard test to be applied in determining whether the offenses are sufficiently distinguishable is the one enunciated in *Blockburger v. United States* (1932), 284 U. S. 299, 304:

> "• • • The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. • • •"

This test stresses the commonality of the elements of the offenses charged and generally forbids cumulative punishments for both a greater and a lesser included offense. *Brown v. Ohio* (1977), 432 U. S. 161, 164-166. It is noteworthy, however, that the two offenses need not be identical in constituent elements or in actual proof in order to be the same for double jeopardy purposes. *Id.* at 164.

The General Assembly has further effectuated the principles contained in the Double Jeopardy Clause by means of R. C. 2941.25, the multiple count statute. *State v. Thomas* (1980), 61 Ohio St. 2d 254, 259-260 [15 O.O. 3d 262]. This statute provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

As in *Blockburger*, this statute involves comparing the elements of the various statutory offenses with which the defendant is charged. Allied offenses of similar import are those offenses which have elements corresponding to such a degree that the commission of one offense will result in the commission of the other. *State v. Logan* (1979), 60 Ohio St. 2d 126, 128 [14 O.O. 3d 373]. Where the offenses are allied, the defendant may not be convicted of them all

unless they were committed separately or with a separate animus as to each. R. C. 2941.25(B).

In this case, the appellee was charged with both aggravated robbery and theft. "Aggravated robbery" was defined in R. C. 2911.01 as follows:[1]

> "(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:
>
> "(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;
>
> **[423]** "(2) Inflict, or attempt to inflict serious physical harm on another.
>
> "(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

"Theft" was defined in R. C. 2913.02:

> "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:
>
> "(1) Without the consent of the owner or person authorized to give consent;
>
> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> "(3) By deception;
>
> "(4) By threat.

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1. R. C. 2911.01, as well as R. C. 2911.02, 2913.02 and 2903.04, *infra*, were amended effective January 5, 1983.

"(B) Whoever violates this section is guilty of theft. * * *"

This court has previously held that where theft does not require the proof of any element not required to be proved for the offense of robbery as defined in R. C. 2911.02,[2] they are the same offense for double jeopardy purposes. *State v. Harris* (1979), 58 Ohio St. 2d 257 [12 O.O. 3d 265]. We believe that the same reasoning applies in the case of theft and aggravated robbery.

The Committee Comment to R. C. 2911.01 indicates that theft is the basic element of robbery with the principle difference between the offenses being that robbery involves an element of actual or threatened personal harm to the victim. The seriousness of the robbery is determined by the degree of actual or potential harm with aggravated robbery involving the highest degree. The element of potential harm to the victim is present in this case due to the appellee's use of a deadly weapon. Therefore, it is apparent that in proving the offense of aggravated robbery the underlying theft offense is also demonstrated. Accordingly, the court below did not err in finding that the prohibition against multiple punishments for the same offense forbade appellee's conviction for both offenses.

Appellee was also charged with both murder and involuntary manslaughter. The former offense is defined in R. C. 2903.02:

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2. R. C. 2911.02 provided:

"(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall use or threaten the immediate use of force against another.

"(B) Whoever violates this section is guilty of robbery, a felony of the second degree."

"(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

Involuntary manslaughter was defined in R. C. 2903.04:

"(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

"(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

"(C) Whoever violates this section is guilty of involuntary man- **[424]** slaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

Clearly, the common element shared by these two offenses is the causing of the death of another with the only distinguishing factor being the mental state involved in that act. Murder is the more serious offense in that it involves the purposeful killing of another. Involuntary manslaughter involves a lesser mental state as it is a killing which proximately results from the defendant's committing or attempting to commit another offense.[3] It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one. Under the *Blockburger* analysis,

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3. Where an offender commits a purposeful murder while committing or attempting to commit a felony, he is properly charged with aggravated murder under R. C. 2903.01.

the possibility of proving a fact for one offense which is not required under the other is excluded. As such, in any case where there is but on victim, the accused may be found guilty of either murder or involuntary manslaughter but certainly not both.

In this case, appellee entered a plea of guilty to the charge of involuntary manslaughter and not guilty to murder. After briefly hearing the facts underlying the charges, the trial court accepted this plea and thereafter properly dismissed the murder charge on double jeopardy principles. The state cannot now be heard to complain about this result as it created the problem by charging the accused with double offenses where only one conviction was possible.

Based upon the foregoing analysis, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., KEEFE, SWEENEY, HOLMES and C. BROWN, JJ., concur.

LOCHER, J., dissents.

KEEFE, J., of the First Appellate District, sitting for W. BROWN, J.

LOCHER, J., dissenting. As I am convinced that the majority has misapplied the Double Jeopardy Clause in the present action, I must respectfully dissent.

It is beyond dispute that a defendant found guilty of a lesser included offense but acquitted on the greater charge may not, consonant with the mandates of the double jeopardy prohibition, be retried on the latter. The same result does not follow, however, where, as in the case at bar, de-

fendant pleaded to the lesser offense and the greater was consequently dismissed [425] without trial. To date, all federal circuit courts of appeals that have addressed the legal issue present in such a scenario have held that a party may be retried as to the greater offense when the original judgment has been set aside. *Hawk v. Berkemer* (C.A. 6, 1979), 610 F.2d 445; *Lowery v. Estelle* (C.A. 5, 1983), 696 F. 2d 333; *United States v. Barker,* (C.A. 9, 1982), 681 F. 2d 589; *Klobuchir v. Commonwealth of Pennsylvania* (C.A. 3, 1981), 639 F. 2d 966; *United States v. Myles* (D.D.C. 1977), 430 F.Supp. 98, affirmed without opinion (C.A.D.C. 1978), 569 F. 2d 161; *United States v. Williams* (C.A. 8, 1976), 534 F. 2d 119; *United States v. Johnson* (C.A. 4, 1976), 537 F. 2d 1170; *United States v. Anderson* (C.A. 7, 1975), 514 F. 2d 583; *United States, ex rel. Williams, v. McMann* (C.A. 2, 1970), 436 F. 2d 103; *Ward v. Page* (C.A. 10, 1970), 424 F. 2d 491.

In reaching their decisions, these federal appellate courts have essentially followed a two-step process of analysis. First, they have held that in the context of multiple trials for the same offense, the principle of double jeopardy is not implicated unless an attempt has been made to retry a party on a charge for which he has already been acquitted. *Lowery v. Estelle, supra,* at 340; *Hawk v. Berkemer, supra,* at 447; *Ward v. Page, supra,* at 493. Secondly, relying upon the United States Supreme Court's decision in *United States v. Scott* (1978), 437 U. S. 82, the courts have ruled that where a charge on an offense has been dismissed as a result of a plea to a lesser included offense, defendant has *not* been acquitted of the greater. *Klobuchir v. Commonwealth of Pennsylvania, supra,* at 969; *United States v. Barker, supra,* at 591. As the court stated in *Scott, supra* at 97, quoting *United States v. Martin Linen* (1977), 430 U. S. 564, 571:

> "* * * [A] defendant is acquitted only when 'the ruling of a judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'"

The province of the jurisprudential philosophy expressed in the aforementioned decisions is manifest, given the underlying policy of the double jeopardy guarantee. Clearly, the primary objective of this constitutional right is to proscribe the physical, emotional and financial "harassment" of parties through repeated prosecutions for the same criminal offense. *Green v. United States* (1957), 355 U. S. 184; *State v. Thomas* (1980), 61 Ohio St. 2d 254. The policy is not violated where the defendant has not truly "run the judicial gauntlet" and, indeed, has voluntarily chosen, by pleading gulity, to end all inquiry into his guilt and where no prosecutorial misconduct, necessitating the retrial, is either present or alleged.

By improperly accepting, over the prosecution's objections, appellee's guilty plea to lesser charges, based on its own misunderstanding of the effect such pleas would have on subsequent jury instructions,[4] the trial court clearly **[426]** abused the discretion granted it under Crim. R. 11(C)(2).[5] Therefore, appellant is entitled to vacation of

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4. The trial court wrongly concluded that appellee's guilty plea to the lesser offense operated to activate his double jeopardy protections and would have precluded the rendition of jury instructions on such offenses were the case to have proceeded to trial. By pleading guilty to the offenses, however, appellee effectively waived his right to a charge on such offenses as his plea represented an admission of culpability. See *Forthoffer v. Swope* (C.A. 9, 1939), 103 F. 2d 707. Thus, this court's holding in *State v. Loudermill* (1965), 2 Ohio St. 2d 79 [31 O.O. 2d 60], was inapposite to the trial court's decision herein.

5. Crim R. 11(C)(2) provides, in pertinent part: "In felony cases the court may refuse to accept a plea of guilty * * *."

the earlier judgment and trial of appellee on the murder charge. Such a result would be consistent with current constitutional standards and would in no way contravene the policy underlying the Double Jeopardy Clause. The prosecution acted in good faith by bringing all possible charges against appellee in a single proceeding and, but for the court's error, all relevant issues of criminal culpability would have been resolved therein.

The majority also errs in the case at bar when it writes that the United States Supreme Court's pronouncement in *Blockburger v. United States* (1932), 284 U. S. 299, establishes the standard for determining whether offenses are "sufficiently distinguishable" to avoid the double jeopardy prohibition against multiple punishments for the same offense. This court explicitly repudiated such an argument in *State v. Moss* (1982), 69 Ohio St. 2d 515 [23 O.O. 3d 447], where we held that the *Blockburger* test is merely a rule of statutory construction and is not to be used alone to divine legislative intent where other tests may be utilized to discern such intent. The majority simply ignores restrictions so recently placed on the applicability of *Blockburger* to double jeopardy questions involving alleged multiple punishments.

Thus, on the basis of the aforementioned reasons, I dissent from today's opinion which affirms the erroneous ruling of the court of appeals.

ORDER OF THE SUPREME COURT OF OHIO

(Dated August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

MANDATE

To the Honorable Common Pleas Court Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed April 1, 1982)

Case No. 8-221

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

STATE OF OHIO,
Plaintiff-Appellant,

VS.

KENNETH M. JOHNSON,
Defendant-Appellee.

OPINION

DAHLING, J.,

This is an appeal from a judgment of the Court of Common Pleas, Lake County, wherein the court dismissed Counts of Murder and Aggravated Robbery. The State of Ohio has appealed.

The reasoning of Judge Jackson in his opinion and judgment concisely states the proposition of law at issue. Judge Jackson stated:

> "Defendant was initially charged in a four count indictment for the offenses of murder, involuntary manslaughter, aggravated robbery and grand theft. On December 10, 1981, the defendant entered pleas of guilty to the lesser offenses of involuntary manslaughter and grand theft.

"The issues presented are twofold. First, whether involuntary manslaughter, in the case at bar, is a lesser included offense of murder. Second, whether grand theft, given the facts at hand, is a lesser included offense of aggravated robbery.

If the answer to either of these questions is yes, then the attachment of jeopardy, by this Court's acceptance of the aforementioned guilty pleas to the lesser offense, would prevent further prosecution and/or conviction on the remaining greater offense. *Ohio Revised Code Ann.* Sec. 2943.09 (Page 1975).

An offense constitutes a lesser included offense when the elements necessary to prove the lesser offense are contained in the proof of the greater offense. As the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1931), stated,

> [t]he applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether, each provision requires proof of an additional fact that the other does not.

See also State v. Harris, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979).

An analysis of the various elements of murder and involuntary manslaughter establishes, under the particular facts of this case, that involuntary manslaughter involves the proof of no fact not required to substantiate the crime of murder.

Therefore, the Court finds on the facts of this case that the State, in substantiating the events that culminated in the death of the instant victim, will

invariably encompass the element of proximate cause while attempting or actually committing a misdemeanor. Hence, as applied, involuntary manslaughter would prevail as a lesser included offense of murder.

In addition, the Court is totally cognizant of the fact that should this case proceed to trial on the remaining charges and the factual evidence presented is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated. *See State v. Loudermill*, 2 Ohio St. 2d 79, 206 N.E. 2d 198 (1965).

For at that juncture of the proceedings, defendant would have been placed in jeopardy for the second time for the exact same offense, rendering totally meaningless the Double Jeopardy Clause embodied in the Fifth Amendment of the United States Constitution.

Addressing the issue of grand theft being a lesser included offense of aggravated robbery, the Court again finds that the charge of grand theft requires proof of no fact not required as an element of aggravated robbery in this case.

By statute, aggravated robbery is defined as a theft, either attempted or actual, committed while possessing a deadly or dangerous weapon. *Ohio Revised Code Ann.* Sec. 2911.01 (Page 1975). The foundation of this offense is a theft. Consequently, it is essential to the proof of aggravated robbery that the underlying theft be established.

The State argues that since the crime of grand theft requires proof of value in excess of $150, which

is not required to prove aggravated robbery, that the test of a lesser included offense has not been satisfied. This Court does not agree.

The factors differentiating grand theft from petty theft pertain to the degree of punishment and not to the establishment of the crime itself. Second, the rationale applied by the Ohio Supreme Court in *State v. Harris, supra,* butresses this position. In *Harris, supra,* grand theft was held to be a lesser included offense of robbery, even though proof of defendant's prior conviction for armed robbery, the factor which elevated the theft to grand theft, is not an element of the crime of robbery. Similarly, in the case at bar, the proof of value does not *ipso facto* place these two crimes outside the scope of the *Blockburger* rule.

Since involuntary manslaughter as it pertains to murder and grand theft as it pertains to aggravated robbery do not require proof of any element not required to be proven in the greater offense, this Court finds that both are the same offense for double jeopardy purposes. In so concluding, the double jeopardy doctrine would prohibit multiple punishments for a singular offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969)."

The State has presented the following Assignments of Error for review:

I. THE LOWER COURT ERRED IN DISMISSING THE COUNTS OF THE INDICTMENT CHARGING MURDER AND AGGRAVATED ROBBERY FOLLOWING APPELLEE'S GUILTY PLEA TO THE OFFENSES OF INVOLUNTARY MANSLAUGHTER AND GRAND THEFT BECAUSE THE OFFENSES OF INVOLUNTARY MANSLAUGHTER AND

GRAND THEFT ARE NOT THE SAME OFFENSES AS MURDER AND AGGRAVATED ROBBERY FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE.

II. WHERE, IN ONE PROCEEDING, AN INDICTMENT CHARGES MURDER, INVOLUNTARY MANSLAUGHTER, AGGRAVATED ROBBERY AND GRAND THEFT, AND A DEFENDANT PLEADS GUILTY TO INVOLUNTARY MANSLAUGHTER AND GRAND THEFT, HE IS NOT SUBJECTED TO MULTIPLE PROSECUTIONS AS PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE, WHERE THE PROCEEDING CONTINUES THROUGH TRIAL ON THE REMAINING COUNTS.

These Assignments of Error are without merit.

Not to be unnecessarily repetitious, but the well reasoned opinion of Judge Jackson adequately covers the issues raised by appellant. We agree that involuntary manslaughter is a lesser included offense of murder and grand theft is a lesser included offense of robbery. The judgment is accordingly affirmed.

Judgment affirmed.

/s/ ALFRED E. DAHLING
Judge

HOFSTETTER, *P.J.*,
COOK, *J.*, Concur

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed April 1, 1982)

Case No. 8-221

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
COUNTY OF LAKE

STATE OF OHIO,
Appellant,

vs

KENNETH M. JOHNSON,
Appellee.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ALFRED E. DAHLING
Judge for the Court

JUDGMENT ENTRY AND OPINION OF THE COURT OF COMMON PLEAS

(Filed March 31, 1981)

Case No. 79 CR 048

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

KENNETH M. JOHNSON;
Defendant.

JUDGMENT ENTRY AND OPINION

This cause is before the Court on defendant's Motion to Dismiss, as supported by his Memorandum in Support of the motion and Reply Memorandum. The State of Ohio has responded with a Brief in Opposition to the Motion to Dismiss and a Reply Memorandum. The Court, upon careful consideration, finds defendant's position with regard to the plea of double jeopardy well taken.

Defendant was initially charged in a four count indictment for the offenses of murder, involuntary manslaughter, aggravated robbery and grand theft. On December 10, 1981, the defendant entered pleas of guilty to the lesser offenses of involuntary manslaughter and grand theft.

The issues presented are twofold. First, whether involuntary manslaughter, in the case at bar, is a lesser in-

cluded offense of murder. Second, whether grand theft, given the facts at hand, is a lesser included offense of aggravated robbery.

If the answer to either of these questions is yes, then the attachment of jeopardy, by this Court's acceptance of the aforementioned guilty pleas to the lesser offense, would prevent further prosecution and/or conviction on the remaining greater offense. *Ohio Revised Code Ann.* §2943.09 (Page 1975).

An offense constitutes a lesser included offense when the elements necessary to prove the lesser offense are contained in the proof of the greater offense. As the United States Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304 (1931), stated,

> [t]he applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether, each provision requires proof of an additional fact that the other does not.

See also State v. Harris, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979).

An analysis of the various elements of murder and involuntary manslaughter establishes, under the particular facts of this case, that involuntary manslaughter involves the proof of no fact not required to substantiate the crime of murder.

Therefore, the Court finds on the facts of this case that the State, in substantiating the events that culminated in the death of the instant victim, will invariably encompass the element of proximate cause while attempting or actually committing a misdemeanor. Hence, as applied,

involuntary manslaughter would prevail as a lesser included offense of murder.

In addition, the Court is totally cognizant of the fact that should this case proceed to trial on the remaining charges and the factual evidence presented is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated. *See State v. Loudermill,* 2 Ohio St. 2d 79, 206 N.E. 2d 198 (1965).

For at that juncture of the proceedings, defendant would have been placed in jeopardy for the second time for the exact same offense, rendering totally meaningless the Double Jeopardy Clause embodied in the Fifth Amendment of the United States Constitution.

Addressing the issue of grand theft being a lesser included offense of aggravated robbery, the Court again finds that the charge of grand theft requires proof of no fact not required as an element of aggravated robbery in this case.

By statute, aggravated robbery is defined as a theft, either attempted or actual, committed while possessing a deadly or dangerous weapon. *Ohio Revised Code Ann.* §2911.01 (Page 1975). The foundation of this offense is a theft. Consequently, it is essential to the proof of aggravated robbery that the underlying theft be established.

The State argues that since the crime of grand theft requires proof of value in excess of $150, which is not required to prove aggravated robbery, that the test of a lesser included offense has not been satisfied. This Court does not agree.

The factors differentiating grand theft from petty theft pertain to the degree of punishment and not to the establishment of the crime itself. Second, the rationale applied by the Ohio Supreme Court in *State v. Harris, supra,* buttresses this position. In *Harris, supra,* grand theft was held to be a lesser included offense of robbery, even though proof of defendant's prior conviction for armed robbery, the factor which elevated the theft to grand theft, is not an element of the crime of robbery. Similarly, in the case at bar, the proof of value does not *ipso facto* place these two crimes outside the scope of the *Blockburger* rule.

Since involuntary manslaughter as it pertains to murder and grand theft as it pertains to aggravated robbery do not require proof of any element not required to be proven in the greater offense, this Court finds that both are the same offense for double jeopardy purposes. In so concluding, the double jeopardy doctrine would prohibit multiple punishments for a singular offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

Therefore, defendant's Motion to Dismiss Count One and Count Three of the indictment is forthwith granted.

Exceptions are noted for the State of Ohio.

IT IS SO ORDERED.

/s/ JAMES W. JACKSON
Judge of the Court of Common Pleas

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated August 31, 1983)

No. 82-657

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

KENNETH M. JOHNSON,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

OHIO REVISED CODE

§2903.02 Murder

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§2903.04 Involuntary manslaughter.

. . .

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

§2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

§2913.02 Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is grand theft, a felony of the fourth degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

§2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

• • •

§2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or of the United States. In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal penal or reformatory institution.

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

. . .

§2953.21 Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

. . .

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge

or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

. . .

[§2967.19.1] §2967.191 Reduction of minimum and maximum sentence.

The adult parole authority shall reduce the minimum and maximum sentence of a prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced, . . .

THE CONSTITUTION OF THE UNITED STATES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14; Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS

No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

JOINT APPENDIX

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Petition for Certiorari Filed November 28, 1983
Certiorari Granted January 23, 1984

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RELEVANT DOCKET ENTRIES

2/13/80 SECRET INDICTMENT returned by the Lake County Grand Jury filed.

11/26/80 DEFENDANT'S WRITTEN PLEA OF GUILTY to the charge of Involuntary Manslaughter filed.

11/26/80 DEFENDANT'S WRITTEN PLEA OF GUILTY to the charge of Grand Theft filed.

12/10/80 JOURNAL ENTRY AND OPINION of the Court of Common Pleas of Lake County accepting defendant's pleas of guilty to the charges of Involuntary Manslaughter and Grand Theft filed.

12/10/80 JOURNAL ENTRY of the Court of Common Pleas of Lake County sentencing defendant to a term of three to ten years in prison for Involuntary Manslaughter and to a term of two to five years for Grand Theft, sentences to run consecutively, filed.

3/31/81 JUDGMENT ENTRY AND OPINION granting defendant's Motion to Dismiss filed.

4/1/82 JUDGMENT ENTRY AND OPINION of the Court of Appeals of Ohio Eleventh District, affirming the decision of the Court of Common Pleas in Case Number 8-221 filed.

8/31/83 JUDGMENT ENTRY, ORDER AND OPINION of the Ohio Supreme Court in Case Number 82-657, affirming the decision of the Ohio Court of Appeals, Eleventh District, filed.

SECRET INDICTMENT

Crim. Rule 6, 7

(Filed February 13, 1979)

COURT OF COMMON PLEAS

THE STATE OF OHIO)
LAKE COUNTY, ss.)

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 25th day of January, 1979, at Mentor-on-the-Lake City, Lake Co., Ohio, one KENNETH M. JOHNSON did purposely cause the death of Thomas David Hill, contrary to and in violation of Section 2903.02 of the Ohio Revised Code and against the peace and dignity of the State of Ohio. This act is punishable by an indefinite term of imprisonment of not less than Fifteen (15) Years to Life, and a fine not more than $15,000.00.

COUNT TWO

On or about the 25th day of January, 1979, in the City of Mentor-on-the-Lake, County of Lake, and State of Ohio, one KENNETH M. JOHNSON did cause the death of Thomas David Hill as a proximate result of the said KENNETH M. JOHNSON's committing or attempting to commit a misdemeanor. This act constitutes a felony of the third degree, contrary to and in violation of Section 2903.04 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

COUNT THREE

On or about the 25th day of January, 1979, in the City of Mentor-on-the-Lake, County of Lake, and State of Ohio, one KENNETH M. JOHNSON, together with Denise Elaine DiPaola and Michael D. Polensek, did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, have a deadly weapon, to-wit: a .380-Caliber Automatic Pistol, on or about his person or under his control, contrary to and in violation of Section 2911.01 of the Ohio Revised Code and against the peace and dignity of the State of Ohio. This constitutes a felony of the first degree.

COUNT FOUR

On or about the 25th day of January, 1979, in the City of Mentor-on-the-Lake, County of Lake, and State of Ohio, one KENNETH M. JOHNSON, together with Denise Elaine DiPaola and Michael D. Polensek, did, with purpose to deprive the owner, Thomas David Hill, of property, to-wit: a Portable Television; Clothing; and Miscellaneous Clothes and Property, knowingly, obtain or exert control over said property without the consent of Thomas David Hill, or a person authorized to give consent, the value of said property being $150.00 or more, a fourth-degree felony, against the peace and dignity of the State of Ohio in violation of the Ohio Revised Code, Title 29, Section 2913.02.

TRANSCRIPT OF PROCEEDINGS

(Hearing Commenced October 9, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

* * * * *

[2] BE IT REMEMBERED, that heretofore, to-wit, on Thursday, October 9, 1980, being one of the regular days of said Court, before the Honorable Paul H. Mitrovich, one of the Judges of the said Court, the above-entitled cause came on for trial upon the pleadings heretofore filed herein.

[3] Mr. Hawkins: Your honor, we are here for the purposes of arraignment. Mr. Johnson is present in court and is represented by counsel, Albert Purola. He has got a four count indictment by the Lake County Grand Jury, one for murder, one for involuntary manslaughter, the third is aggravated robbery and the fourth is grand theft.

The Court: Mr. Purola?

Mr. Purola: Your honor, the defendant was served with a copy of the indictment not quite 24 hours ago, but we waive the 24 hour requirement because the defendant studied the indictment with his counsel, would waive any defects in service in the indictment and waive the reading of the indictment at this time.

Mr. Johnson: Your honor, I plead guilty to counts 2 and 4; not guilty to counts 1 and 3.

Mr. Purola: That is our desire.

The Court: Tell me that again? [4] You shocked me.

Mr. Purola: Pleading guilty to counts 2 and 4, Judge; not guilty to counts 1 and 3.

Mr. Hawkins: Your honor, the State recommends that the pleas of guilty not be accepted at this time until the State has an opportunity to try the case on the other two counts.

The Court: How about that, Mr. Purola?

Mr. Purola: Well, I believe, your honor, on the general issue at the arraignment, under criminal Rule 11, defendant is entitled to plead guilty or not guilty to any part of the indictment, and that is what the defendant is doing.

Mr. Hawkins: But the Court is not obligated to accept that plea, your honor.

The Court: That's correct. Procedurally what problem is that going to create by not accepting the plea at this time?

Mr. Purola: I'm not sure I [5] understand the Court's question. What problems?

The Court: Well, there are always problems created when the normal procedures are short-circuited by doing something that is unusual and certainly pleading guilty to two counts in an indictment and pleading not guilty to two counts of an indictment is unusual procedure. It's not unheard of but it is unusual. And I am just wondering, for the defendant's benefit, what problems he is creating for himself by entering a plea at this time?

Mr. Purola: I understand that question, Judge, and I can assure you that it has been carefully thought out and

in the face of an indictment of this kind, given the facts of this case as the defendant knows them, I don't think it poses any problem to him that he is not fully cognizant of, and that he is not fully prepared to litigate.

Obviously, if the State were to proceed on the prosecution of the other two counts as I am sure they would, the defendant [6] would have certain matters to bring to the Court's attention, whichever judge is assigned the cases.

Mr. Hawkins: Your Honor, I believe if the defendant pleads guilty to count 2 which is involuntary manslaughter, and count 4, grand theft, I think that there would be double jeopardy problems if the State chooses to prosecute him on count 1, murder, and count 3, aggravated robbery.

The Court: Perhaps that's why he is pleading.

Mr. Hawkins: I'm sure it is, your honor. But I think if the Court refuses to accept that plea it may prejudice the defendant in the sense that he is going to have to face a jury trial in which he may be convicted of something else, but it doesn't violate any constitutional guaranteed right. And in being fair to both parties, certainly the State of Ohio has the right to present its case to the trier of fact, and ask for a verdict upon the highest provable charges.

Mr. Purola: I don't disagree [7] with that, Judge, except at this stage of the case the Grand Jury has charged this man with these offenses, and the rule that governs this gives him the right to plead guilty or not guilty to that charge. This is a general issue. This is not a plea negotiation. This is the charge.

The Court: I understand. Perhaps we ought to adjourn to chambers and discuss this.

(Thereupon, further discussion was held in the Court's chambers, off the record.)

The Court: You may be seated. You are Kenneth M. Johnson?

Mr. Johnson: Yes, sir.

The Court: The State charges that on the 25th day of January, 1979, at Mentor on the Lake City, Lake County, Ohio, one Kenneth M. Johnson did purposely cause the death of Thomas David Hill, contrary to and in violation of Section 2903.02 of the Ohio Revised Code and against the peace and dignity of the State of Ohio. This act [8] is punishable by an indefinite term of imprisonment of not less than Fifteen (15) years to life, and a fine not more than $15,000.00.

Count 2 of the indictment states that on or about the 25th day of January, 1979, in the City of Mentor on the Lake, County of Lake, and State of Ohio, one Kenneth M. Johnson did cause the death of Thomas David Hill as a proximate result of the said Kenneth M. Johnson's committing or attempting to commit a misdemeanor. This act constitutes a felony of the third degree, contrary to and in violation of Section 2903.02 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

The State charges in the third count of the indictment that on or about the 25th day of January, 1979, in the City of Mentor on the Lake, County of Lake, and State of Ohio, one Kenneth M. Johnson, together with Denise Elaine DiPaola and Michael D. Polensek, did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately [9] after such attempt or offense, have a deadly weapon, to-wit: a .380 caliber automatic pistol, on or about his person or under his control, contrary to and in violation of Section 2911.01 of the Ohio Revised Code

and against the peace and dignity of the State of Ohio. This constitutes a felony of the first degree.

The State charges in the fourth count of the indictment that on or about the 25th day of January, 1979, in the City of Mentor on the Lake, County of Lake, and State of Ohio one Kenneth M. Johnson, together with Denise Elaine DiPaola and Michael D. Polensek, did, with purpose to deprive the owner, Thomas David Hill, of property, to-wit: a portable television; clothing; and miscellaneous clothes and property, knowingly, obtain or exert control over said property without the consent of Thomas David Hill, or a person authorized to give consent, the value of said property being $150.00 or more, a fourth-degree felony, against the peace and dignity of the State of Ohio in violation of the Ohio Revised Code, Title 29 Section 2913.02.

[10] Now, the first count of the indictment requires, if convicted, a penalty of not more than life nor less than 15 years, and/or a maximum money fine of $15,000.

The second count of the indictment is a felony of the third degree and a felony of the third degree is punishable by a minimum term of one year, one and a half years, two years, three years, a maximum of ten years, and/or a maximum money fine of $5,000.

The third count of the indictment is a felony of the first degree and that is punishable by a minimum term of four, five, six or seven years, a maximum of 25 years, and/or a maximum money fine of $10,000.

The last count of the indictment is a fourth degree felony and that is punishable by a minimum term of incarceration of 6 months, one year, one and a half years or two years, a maximum of five years, and/or a maximum money fine of $2,500.

Now, do you understand the charges that are made against you and the possible penalties that you face?

Mr. Johnson: Yes, sir, your honor.

[11] The Court: Very well. The Court acknowledges that heretofore you have entered a plea of guilty, or—excuse me, you have offered to enter a plea of guilty to counts 2 and 4 of the indictment; and a plea of not guilty to counts 1 and 3 of the indictment. The Court at this time will reserve ruling on accepting your plea and would now move to set bail.

Mr. Hawkins: Your honor, the defendant has been absent for 20 months after his arrest. He was originally able to get out of the custody of the State of Ohio because the municipal prosecutor who handled the preliminary hearing made a mistake which forced the judge to dismiss the case against him at the municipal level. Before we could return an indictment Mr. Johnson disappeared and he has been at large ever since that time, though I am sure he has communicated with his family.

Considering the nature of the crimes, the fact that he has already left the area once for 20 months, we would recommend $100,000 cash or surety bond be set on the [12] individual to insure his appearance.

Mr. Purola: I don't intend to make any argument regarding bond, your honor. The bond would be understandably large. Whether or not $100,000 is reasonable is debatable.

The Court: Are you working, Mr. Johnson?

Mr. Johnson: No, sir, your honor. I was working in the state of Tennessee.

The Court: The Court will set the bail at $20,000, 10 percent. If the defense or the prosecutor have any law

they would like the Court to consider regarding the defendant's offer of his pleas, the Court will entertain whatever you present.

Mr. Purola: Thank you, Judge.

The Court: Is there anything further?

Mr. Hawkins: No, sir.

TRANSCRIPT OF PROCEEDINGS

(Hearing Commenced November 26, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

* * * * *

[2] BE IT REMEMBERED, that heretofore, to-wit, on Wednesday, November 26, 1980, being one of the regular days of said Court, before the Honorable James W. Jackson, one of the Judges of the said Court, the above-entitled cause came on for trial [sic] upon the pleadings heretofore filed herein.

* * * * *

[15] The Court: Do you wish to address yourself to the question that was raised in the brief, as why the indictment was framed by the Prosecutor's Office to the Grand Jury as to the four counts and not one count, not two counts?

Mr. Hawkins: Yes. There were three defendants in this particular case, your Honor. Michael Polensek, Denise DiPaola, and Kenneth Johnson. Michael Polensek and Denise DiPaola were indicted for involuntary manslaugh-

ter, because they, the facts did not indicate that they were the ones who actually perpetrated the murder, and for obvious reasons, evidence which we did not have we could not indict them. That was the case with Kenneth Johnson, also, Denise DiPaola and Michael Polensek made statements that indicated, when they were arrested, that the defendant may plead self-defense or that they were anticipating the defendant to plead self-defense. Such a defense would preclude the State from asking for instructions on the lesser included offenses at trial, as in *State v. Nolton*. If the defendant, Kenneth Johnson, plead self-defense, a defense **[16]** which would inspire him in not only murder, but any lesser crimes that the State of Ohio could not ask to instruct on the lesser included offense.

The Court: By the same token, Mr. Hawkins, is the defendant not entitled to, if the self-defense is established, an acquittal upon the proper charge?

Mr. Hawkins: But that is a definition of fact.

The Court: Obviously, but the question of your indictment on the four counts, as to the reason you went and sought the indictment, the indictment on two counts, involuntary manslaughter and grand theft.

Mr. Hawkins: Does the Court hold the State of Ohio at fault for attempting to anticipate the defense?

The Court: No, the Court does not hold the State of Ohio at fault for anticipating the defense.

Mr. Hawkins: Just that we anticipated the defense and the fact that we indicted on a multi-count indictment. This is really not the issue. It is whether you are going to accept the defendant's wishes to avoid the **[17]** prosecution on the more severe counts.

The Court: Well, that is the argument that you are raising.

Mr. Hawkins: Yes, your Honor.

The Court: This is what I am to evaluate, whether or not the defendant understands the nature and voluntariness of the proffered plea to this Court.

Mr. Hawkins: Yes, sir. We feel it is germane in this issue. We feel that even if the defendant understands the nature of the act and his plea of guilty is voluntary, and I am sure it is, our argument is, that the Court is not obligated to accept that plea. The Court is also obligated to protect the interests of the other parties in this case, which in this case is the people of Ohio. The State of Ohio does not consent, again, to his plea. This is not a negotiating plea on our part. We want to prosecute this man for the crimes that he has committed and the charges which he has been indicted on.

Mr. Purola, again, argues about the Grand Jury, and they chose to indict on these charges. They chose to indict on all four charges. They [18] also saw probable cause that he committed the crimes of murder and aggravated robbery.

The Court: Would you distinguish this case between other cases where the Prosecutor's Office does agree and consent to a lesser included offense of this nature?

Mr. Hawkins: Plea negotiations, your Honor, are evils which the State of Ohio and the courts must accept until we have sufficient courts and prosecutors to eliminate the necessity thereof. The basis of plea negotiations can depend upon many things, as the Court knows when it was a trial attorney, sometimes the State will not have evidence at the time of trial sufficient to convict a man of the more serious charges. Sometimes, your Honor, the defendant himself is not that bad of character and the State of Ohio may warrant or feel that he should be given

the benefit of the doubt and is allowed to plead to a lesser included offense. There are various numbers of reasons for plea negotiations, your Honor, but the State of Ohio is always a part of those negotiations. Certainly not just giving him the maximum of five to fifteen years, which means in effect that he could be out on the street in [19] eighteen months. That is what he is trying to do. He is not entering this plea in repentantness. He is not sorry for the murder of Thomas Hill. He is not sorry—

The Court: Well, Mr. Hawkins, we haven't determined at this point, based upon the testimony before this Court at the previous arraignment, what Mr. Johnson's statements are going to be if he pleads to involuntary manslaughter, and he gives sufficient facts from his statements that indicate that he did in fact perpetrate the murder on Thomas Hill.

Mr. Hawkins: The Court should not accept the plea. It would preclude us in prosecuting—

The Court: I believe we are getting into an argument that may be addressed after I address the defendant as to whether I will determine whether or not his proffered plea of guilty is voluntary.

Mr. Hawkins: Well, your Honor, again, if you will please bear with me, I am only trying to do my best for this particular client and this particular case.

The Court: And the Court is [20] fully cognizant of the State's position.

Mr. Hawkins: What is his statement? He cannot offer to plead guilty to involuntary manslaughter and have the Court do anything other than—

The Court: I understand that but let's address ourselves, as long as we are going on this line, Mr. Hawkins, if

the Court, without making any decisions, follows your determination of Rule 11 C(2), and takes the position that there is no basis in this case, as the State of Ohio decides or the Grand Jury indicts on, to not accept the plea of guilty, what is the purpose of the arraignment?

Mr. Hawkins: The bond setting and the arraignments, in pleas of guilty, have been dual in purpose, long before this Court sat. The arraignment is merely to inform the defendant of the charges against him, and to get from him a plea. It's just a matter of setting the participant litigants in the trial at odds with one another. To reach a point where there is a factual issue which can be decided by a trier of fact. The defendant has been informed of the charges against him. He has been arraigned. **[21]** The plea that he wishes to enter is separate and distinct from the arraignment. The Court is not obligated to accept his plea merely because it has arraigned him and he wishes to enter a plea of guilty. The Court can say no, I don't accept your plea, you plead not guilty, and the State of Ohio is going to have the opportunity to prosecute you, and this Court will do its utmost to insure that each and every step of the prosecution against you conforms to the constitutional rights of the United States Government and the State of Ohio.

* * * * *

WRITTEN PLEA OF GUILTY

(Filed November 26, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

I, Kenneth M. Johnson, the defendant in the above-captioned case hereby state that my counsel has explained to me the facts and circumstances surrounding my plea, and the Court and my counsel have informed me of the charge against me and the penalty provided by law for that charge.

Prior to signing this written plea of guilty, the Court has personally addressed and explained to me that I have the following Constitutional rights which I would waive by pleading guilty. I have the right to a jury trial, to confront any witness who testifies against me; to have compulsory process for obtaining witnesses in my favor; the right to an attorney; and that the Court will appoint an attorney to represent me if I cannot afford one. The Court informed me that the State would be required to prove me guilty beyond a reasonable doubt at a trial in which I cannot be compelled to testify against myself. The Court has personally informed me of the maximum penalty involved and the crime to which I am pleading is an offense for which I may be incarcerated. The Court has also informed me that if I was convicted at trial, I would have a right to appeal, and that the Court upon acceptance of my plea of guilty may immediately proceed with judgment and sentence.

I hereby state that I understand these rights and privileges and the possible consequences of a guilty plea, and

I am voluntarily pleading guilty of my own free will and no inducement or promise has been made to me by the Prosecutor's office, my counsel, the Court or any one else to secure my plea of guilty. I hereby waive and reject all of these rights. I hereby enter a plea of "Guilty" to the crime of Grand Theft, Count Four, of the indictment, in violation of Ohio Revised Code Section 2913.02, which carries a possible penalty of not less than ½, 1, 1½, or 2 years nor more than 5 years and a possible fine of between $2,500 and any, [sic] K. J.

/s/ KENNETH M. JOHNSON
Defendant

WITNESSED BY:

/s/ ROBERT L. HITZEL
Bailiff

/s/ ALBERT L. PUROLA
Attorney for Defendant

ENTRY

The Court finds that the defendant was advised of all his constitutional rights and that he understood, waived, and rejected them before entering his plea.

The above plea of guilty is accepted and ordered filed.

/s/ JAMES W. JACKSON
Judge

WRITTEN PLEA OF GUILTY

(Filed November 26, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

I, Kenneth M. Johnson, the defendant in the above-captioned case hereby state that my counsel has explained to me the facts and circumstances surrounding my plea, and the Court and my counsel have informed me of the charge against me and the penalty provided by law for that charge.

Prior to signing this written plea of guilty, the Court has personally addressed and explained to me that I have the following Constitutional rights which I would waive by pleading guilty. I have the right to a jury trial, to confront any witness who testifies against me; to have compulsory process for obtaining witnesses in my favor; the right to an attorney; and that the Court will appoint an attorney to represent me if I cannot afford one. The Court informed me that the State would be required to prove me guilty beyond a reasonable doubt at a trial in which I cannot be compelled to testify against myself. The Court has personally informed me of the maximum penalty involved and the crime to which I am pleading is an offense for which I may be incarcerated. The Court has also informed me that if I was convicted at trial, I would have a right to appeal, and that the Court upon acceptance of my plea of guilty may immediately proceed with judgment and sentence.

I hereby state that I understand these rights and privileges and the possible consequences of a guilty plea, and

I am voluntarily pleading guilty of my own free will and no inducement or promise has been made to me by the Prosecutor's office, my counsel, the Court or any one else to secure my plea of guilty. I hereby waive and reject all of these rights. I hereby enter a plea of "Guilty" to the crime of Involuntary Manslaughter, Count Two, of the indictment, in violation of Ohio Revised Code Section 2903.04, which carries a possible penalty of not less than 1, 1½, 2, or 3 years nor more than 10 years and a possible fine of between $5,000 and $15,000.

/s/ KENNETH M. JOHNSON
Defendant

WITNESSED BY:

/s/ ROBERT L. HITZEL
Bailiff
/s/ ALBERT L. PUROLA
Attorney for Defendant

ENTRY

The Court finds that the defendant was advised of all his constitutional rights and that he understood, waived, and rejected them before entering his plea.

The above plea of guilty is accepted and ordered filed.

/s/ JAMES W. JACKSON
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 10, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

This day, to-wit: November 26, 1980, came the Lake County Prosecuting Attorney, John E. Shoop, by and through Judson J. Hawkins, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and the defendant, Kenneth Johnson, being in Court and represented by counsel, Albert L. Purola, Esquire, the defendant plead "Not Guilty" to Count One of the Indictment, to-wit: Murder which carries a penalty of life imprisonment, in violation of Section 2903.02 of the Ohio Revised Code, and Count Three of the Indictment, to-wit: Aggravated Robbery, a felony of the first degree, in violation of Section 2911.01 of the Ohio Revised Code; the defendant plead "Guilty" to Count Two of the Indictment, to-wit: Involuntary Manslaughter, a felony of the third degree, in violation of Section 2903.04 of the Ohio Revised Code, and Count Four of the Indictment, to-wit: Grand Theft, a felony of the fourth degree, in violation of Section 2913.02 of the Ohio Revised Code.

The Court, after advising the defendant of all his legal rights regarding trial and prosecution and finding that the defendant understands such rights, and that his plea is being entered knowingly and voluntarily, accepts the defendant's plea of "Guilty" to a violation of Section 2903.04 of the Ohio Revised Code, a felony of the third degree, and Section 2913.02 of the Ohio Revised Code, a felony of the fourth degree.

Sentencing is hereby deferred until Tuesday, December 9, 1980 at 9:00 a.m.

/s/ JAMES W. JACKSON
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 10, 1980)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

(Title Omitted in Printing)

This day, to-wit: December 9, 1980, came the Lake County Prosecuting Attorney, John E. Shoop, by and through Judson J. Hawkins, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and the defendant, Kenneth Johnson, being in Court and represented by counsel, Albert L. Purola, Esquire, the defendant having heretofore entered a plea of "Guilty" to Count Two of the Indictment, to-wit: Involuntary Manslaughter, a felony of the third degree, in violation of Section 2903.04 of the Ohio Revised Code, and Count Four of the Indictment, to-wit: Grand Theft, a felony of the fourth degree, in violation of Section 2913.02 of the Ohio Revised Code.

The Court having given the defendant the opportunity to speak before judgment and sentence was pronounced against him;

IT IS THE ORDER OF THIS COURT that the defendant, Kenneth Johnson, be and hereby is sentenced to serve an indeterminate term of from Three (3) to Ten (10) Years in the Ohio State Reformatory, Mansfield, Ohio for Count Two and Two (2) to Five (5) Years in the Ohio State

Reformatory, Mansfield, Ohio for Count Four to be served consecutively, and the Clerk of Courts is hereby ordered to issue a warrant, directed to the Lake County Sheriff's Department, to convey defendant to said institution. It is further ordered that the defendant pay the costs of this action, taxed at $....., for which execution is hereby awarded.

This order is imposed under and by virtue of Section 2903.04 and Section 2913.02 of the Ohio Revised Code.

Bond is hereby released.

IT IS SO ORDERED.

/s/ JAMES W. JACKSON
Judge

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SUPREME COURT, U.S.

CASE NO. A-275 83-904

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF OHIO,

v.

KENNETH M. JOHNSON,

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OPPOSING PETITION FOR CERTIORARI

Albert L. Purola
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38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

ARGUMENT OPPOSING THE GRANTING OF CERTIORARI

As this Court knows, Ohio is a so-called syllabus state, meaning that the law of any case decided by the Supreme Court of Ohio appears only in the syllabus of the Opinion which is prepared by the Court itself. *Beck v. Ohio*, 379 U.S. 89 (1964), at 93, n. 2.

The two syllabi of the present case make no reference to any provision of the federal constitution and it is clear from reading them that the judgment below rests on an independent and adequate state ground which denies this Court the jurisdiction to review it. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

The state ground involved is Revised Code Section 2941.25(A) (which is printed in the appendix to the petitioner's brief). In that statute the Ohio legislature has provided for the treatment of fact situations, like this one, where the conduct of a person can be construed to amount to two or more allied offenses of similar import.

While a person in Ohio can clearly be charged with all offenses arising from his act, he may only be convicted of one. In this case, then, if Mr. Johnson had gone to trial on this four-count indictment and been convicted of all charges, two convictions would have to have been set aside by the trial judge under Revised Code Section 29451.25(A). However, at that point it does not take much insight to figure out which two would be set aside and which two would be enforced.

By pleading guilty at the arraignment, Kenneth Johnson made the decision himself instead of letting the prosecutor or the trial judge make it.

This case, as far as the Ohio Supreme Court is concerned, involves only interpreting and applying a state statute and does not involve interpreting the Double Jeopardy Clause in a manner other than in conformity with this Court's decisions.

Because of the adequate, independent state ground supporting the decision below, this Court does not have jurisdiction to grant a writ of certiorari.

The petitioner's basic complaint is not even disguised in its petition to this Court: Dissatisfaction with the trial judge and the acceptance of the pleas of guilty. At page 6 of the petition, the state's counsel has written: "But rather, the Defendant-Respondent has, through an errant trial court's abuse of discretion, been allowed to plead guilty to the crimes of his choice, . . ."

Even if that were a proper characterization of what happened, this Court is not in the business of correcting 'errant trial court[s]'.

In fact, the decision below is correct and it achieved the correct result.[1] The following, from the Opinion of the Supreme Court of Ohio, disposes of the controversy:

> The state cannot now be heard to complain about this result as it created the problem by charging the accused with double offenses where only one conviction was possible. [2]

Nothing in this petition or in this case commends itself to the discretionary granting of a writ of certiorari. The writ must be denied.

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

---

1. The respondent does not concede that *Ashe v. Swenson*, 397 U.S. 436 (1970) has no application to a proper analysis of the facts here. That, however, is even more reason to deny the writ.

2. 6 Ohio St. 3d 420 at 424.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief Opposing Petition for Certeorari have been served on the petitioner, State of Ohio, by forwarding such copies to the office of counsel, John E. Shoop, Lake County Prosecutor, Lake County Court House, 47 N. Park Place, P.O. Box 490, Painesville, Ohio 44077, by United States Mail, postpaid, this 27th day of December, 1983.

Albert L. Purola

AFFIDAVIT REGARDING SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that he personally caused the documents in this case, to wit: the motion for leave to proceed in forma pauperis and brief opposing petition for certiorari, to be deposited in the United States Mail, first class postage prepaid and addressed to the Clerk of the Supreme Court, Washington, D.C. before 6:00 p.m., E.S.T. on December 28, 1983 at Willoughby, Ohio 44094.

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

Sworn to and signed in my presence this 27th day of December, 1983.

Sharon B. Swartz, nbm
Notary Public

SHARON B. SWARTZ, Notary Public
STATE OF OHIO - (Lake County)
My Commission Expires Jan. 7, 1985

ORIGINAL

83-904

CASE NO. A-275

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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CASE NO. A-275

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON,

Respondent.

Pursuant to Rule 46 of the Rules of this Court, the respondent moves this Court for leave to proceed in forma pauperis.

The respondent has been incarcerated for over three years and has had no income during that time. Mr. Johnson has had retained counsel in the state court system, but that was financed by a relative who is no longer willing or able to retain a lawyer and has no obligation to do so.

The history and attached Affidavit demonstrate that Mr. Johnson can proceed in this Court only under the provisions of Rule 46.

Albert L. Purola
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38052 Euclid Avenue
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(216) 951-2323

Attorney for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion for Leave to Proceed in Forma Pauperis have been served on the petitioner, State of Ohio, by forwarding such copies to the office of counsel, John E. Shoop, Lake County

Prosecutor, Lake County Court House, 47 N. Park Place, P.O. Box 490, Painesville, Ohio 44077, by United States Mail, postpaid, this 27 day of December, 1983.

Albert L. Purola

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. A-275

THE STATE OF OHIO,

Petitioner,

vs.

KENNETH M. JOHNSON,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Kenneth M. Johnson, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed on appeal with being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore.

I further swear that the responses I have made to the questions relating to my ability to pay the cost of prosecuting this petition are true.

I am not presently employed and have not been since 1980. I have been incarcerated in the Ohio State Reformatory or the Ohio State Penitentiary since November, 1980.

I have not received any income from any source during this time.

I do not have any savings nor do I own any property, either real or personal.

Kenneth M. Johnson

Kenneth M. Johnson

Sworn and subscribed to before me this DEC 19 1983 day of _____, 1983.

CLARENCE E. PFEIFER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES FEB. 25, 1988

Clarence E. Pfeifer

Notary Public

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FILED
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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 83-904

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENTS IN RESPONSE TO BRIEF OPPOSING PETITION FOR CERTIORARI

I. In reviewing a Petition for a Writ of Certiorari the United States Supreme Court looks to the opinion of the State Court decision in a "syllabi" state in order to resolve whether a substantial Federal question had been passed upon in the State Court, and the judgment will not be allowed to stand where the opinion accompanying the syllabi erroneously placed the concurrence of its author upon compulsion by Federal Law.

The Court's method of reviewing a Petition for a Writ of Certiorari is not restricted to a tunnel vision look at only the syllabi of the State Court opinion. The deter-

mination rests on whether the whole record shows that the decision is based on a substantial Federal ground or on an independent State ground.

This Court has held that there is no reason why the Court should not look to the opinion of the State Court whose decision was brought up for review, in order to resolve whether any Federal question had been passed upon in the State Court. *Murdock v. Memphis,* 20 Wall. 590, 22 L. Ed. 429 (1874).

Respondent improperly cites *Beck v. Ohio,* 379 U.S. 89 (1964) for the proposition that the law of Ohio appears only in the syllabus of the opinion which is prepared by the Court itself. *Beck, supra,* at 93, clearly does not decide the question of whether the opinion should be looked to as well as the syllabi to determine the basis for the State Court decision. The Court "puts aside" that question.

The Court did, however, decide the issue at a later date in *Perkins v. Benguet Consolidated Mining Company,* 342 U.S. 437 (1952). Where the syllabus of the Ohio Supreme Court standing alone might have meant that the decision rested solely upon state law, and where the syllabus was accompanied by an opinion which erroneously placed the concurrence of its author upon compulsion by Federal Law, and where the report of the case did not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion, this Court held: First, that the opinion was an official part of the report of the case; Second, although the Ohio law recognized that the syllabus constituted the official opinion of the Court the law still required that the syllabus be read in the light of the facts and issues of the case; and Third, that the judgment would not be allowed to stand where the opinion accompanying the syllabus erro-

neously placed the concurrence of its author upon compulsion by Federal Law. *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952).

In the present case the syllabus of the Ohio Supreme Court is accompanied by an opinion which relies on a misapplication of the Double Jeopardy Clause. The report of the case does not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion. The opinion was erroneously based upon compulsion by Federal Law. The Court misinterpreted the United States Supreme Court's pronouncement in *Blockburger v. United States*, 284 U.S. 299 (1932) which establishes a rule of statutory construction. The *Blockburger* rule was used erroneously to determine legislative intent where other tests should have been used to discern such intent. This Court wrote in constructing its decision in *Blockburger* that:

> "The *Blockburger* test is a 'rule of statutory construction' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333 (1981).

As in *Perkins, supra*, at 443, the opinion of the Ohio Supreme Court should not be allowed to stand.

The decision of the Ohio Supreme Court rests on a misinterpretation of Federal law rather than solely on State law. Respondent's attempt at limiting this Court's review to the syllabi alone is not supported by law and the mere proposing of such an argument suggests that in looking past the syllabi one can only conclude that the Supreme Court of Ohio's decision rests upon substantial Federal questions.

II. The reference in the second syllabus of the State of Ohio's opinion in this case to the Double Jeopardy Clause is itself enough to establish that the judgment rests on a substantial Federal question and is therefore reviewable by the United States Supreme Court.

A writ of certiorari should be granted even if this Court looks to only the syllabi. Respondent's statement, "the two syllabi of the present case make no reference to any provisions of the federal constitution . . ." is untrue. Rather, the second syllabus directly refers to the Double Jeopardy Clause of the Fifth Amendment:

> "The offenses of murder, R.C. 2903.02, and involuntary manslaughter, R.C. 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental states. *The prohibition against double jeopardy requires* that in any one killing, the offender may be convicted of one or the other of the offenses but not both." *State of Ohio v. Johnson*, 6 Ohio St. 3d 420 (1983).

The reference to the Double Jeopardy Clause in the second syllabus of the opinion at bar may be viewed in two possible ways. Either the State Court rendered the decision based upon Federal constitutional grounds, or the decision rests on State grounds and the State Court felt compelled by its understanding of Federal constitutional considerations to construe State law in the manner it did. Whichever is the case, the Supreme Court will decide the Federal issues. *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-631 (1973); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

CONCLUSION

For all the foregoing reasons Petitioner prays that this Court grant the petitioned for Writ of Certiorari.

Respectfully submitted,

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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the double jeopardy clause of the United States Constitution prohibits the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing arguably greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

II. Whether the double jeopardy protections of the United States Constitution prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where the defendant persuades the trial court prior to trial, to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

III. Whether murder as defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as defined in Ohio Revised Code Section 2903.04 are the same offenses for purposes of the double jeopardy provision precluding multiple punishments for both those offenses.

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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONER

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS OF THE COURT BELOW

The Official Report of the Opinion by the Supreme Court of Ohio affirming the judgment of the Ohio Court of Appeals for the Eleventh District. Petition for Writ of Certiorari, Appendix at p. A1.

The Judgment Entry and Opinion of the Ohio Court of Appeals for the Eleventh District affirming the judgment of the Court of Common Pleas, Lake County, Ohio. Petition for Writ of Certiorari, Appendix at p. A14.

The Judgment Entry and Opinion of the Court of Common Pleas, Lake County, Ohio, granting the Defendant's Motion to Dismiss the charges of Murder and Aggravated Robbery. Petition for Writ of Certiorari, Appendix at p. A21.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on August 31, 1983. No Motion for Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Petitioner's Writ for Certiorari Appendix at p. A26.

(5th Amendment) of the United States Constitution

(14th Amendment) of the United States Constitution

Article I, Section 10 of the Constitution of Ohio

Ohio Revised Code, Section 2903.02(A)(B) Murder

Ohio Revised Code, Section 2903.04(B)(C) Involuntary Manslaughter

Ohio Revised Code, Section 2911.01(A)(B) Aggravated Robbery

Ohio Revised Code, Section 2913.02(A)(B) Theft

Ohio Revised Code, Section 2929.41(A)(B) Multiple Sentences

Ohio Revised Code, Section 2953.21(A)(G) Petition to Vacate or Set Aside Sentence

Ohio Revised Code, Section 2967.191 Reduction of Minimum and Maximum Sentence

Ohio Revised Code, Section 2939.06 Oath to Grand Jury (Brief Appendix p. A5)

Ohio Revised Code, Section 2939.08 Duty of Grand Jury (Brief Appendix p. A5)

Ohio Revised Code, Section 2941.25 Multiple Counts (Brief Appendix pp. A5-A6)

Ohio Rules of Criminal Procedure, Rule 11 (Brief Appendix pp. A1-A4)

Mentor-on-the-Lake, Ohio, Codified Ordinance Section 672.12 Discharge of a Firearm within the City Limits (Brief Appendix p. A6)

STATEMENT OF THE CASE

In the early morning hours of January 25th, 1979, Thomas Hill was shot to death at his apartment in the City of Mentor-on-the-Lake, Lake County, Ohio. At the time of the killing of Thomas Hill several items of his personal property were stolen from his apartment.

The Defendant-Respondent and two Co-Defendants were arrested in connection with the slaying less than twelve hours later. A preliminary hearing was held within five days of those arrests in the Mentor Municipal Court, and due to a City Prosecutor's error, all charges were dismissed against the Defendant-Respondent and his bond was released.

On February 13, 1979, the Lake County Grand Jury found that probable cause existed to believe that the Defendant-Respondent had violated four separate criminal statutes, and the Grand Jury returned a single Secret Indictment charging the Defendant-Respondent with one count of Murder in violation of Ohio Revised Code Sec-

tion 2903.02(A), one count of Involuntary Manslaughter in violation of Ohio Revised Code Section 2903.04(B), one count of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01(A)(1), and one count of Grand Theft in violation of Ohio Revised Code Section 2913.02(A)(1) (See Petition for Writ of Certiorari, Appendix at pp. A26-A27), in Case No. 79-CR-048 (See Joint Appendix at pp. 2-3).

Prior to the action of the Grand Jury the Defendant-Respondent absented himself from the jurisdiction of Lake County, and it was not until nearly two years after Thomas Hill's death that he was arrested in the State of Tennessee. Upon his apprehension and return to Ohio, the Defendant-Respondent was brought before a Lake County Common Pleas Judge for purposes of arraignment on October 9, 1980. At that hearing the Defendant-Respondent proffered "Guilty" pleas to the charges of Involuntary Manslaughter and Grand Theft and "Not Guilty" pleas to the charges of Murder and Aggravated Robbery. The State of Ohio objected to the proffer of the guilty pleas (Joint Appendix, p. 5, Transcript of Proceedings, October 9, 1980), and the arraigning judge reserved ruling on whether or not he was obligated to accept the pleas (Joint Appendix, pp. 9-10, Transcript of Proceedings, October 9, 1980). Bond was set in the matter, and the case was subsequently assigned to the trial court. The trial court was faced with the issue of whether or not it should accept the proffered guilty pleas to the lesser offenses.

Following written arguments by both sides and over the vehement objections of the State of Ohio (Record, Transcript of Proceedings, November 26, 1980, pp. 4-9), the Defendant-Respondent, at a hearing on November 26, 1980, persuaded the trial court to exercise its discretion in favor of accepting his guilty pleas to the lesser indicted offenses

of Involuntary Manslaughter and Grand Theft (Record, Transcript of Proceedings, November 26, 1980, p. 38). The Court then sentenced Defendant-Respondent to three to ten years on the Involuntary Manslaughter count and two to five years on the Grand Theft count with those sentences to run consecutively (See Joint Appendix at pp. 20-21).

Following those pleas the Defendant-Respondent moved to dismiss the remaining counts of Murder and Grand Theft on Double Jeopardy grounds arguing that continued prosecution amounted to multiple prosecutions for the same offense and also invoking the doctrine of collateral estoppel. The trial court granted the Motion to Dismiss following briefs and arguments (Record, Transcript of Proceedings, January 26, 1981) in its Judgment Entry and Opinion of March 31, 1981 (See Petition for Writ of Certiorari, Appendix at p. A21).

Thereupon the State of Ohio filed an appeal of the trial court's dismissal of the remaining counts with the Court of Appeals of Ohio, Eleventh District, Lake County, Case No. 8-221. The State Court of Appeals, in its Judgment Entry and Opinion of April 1, 1982, affirmed the trial court's dismissal of the counts in the indictment charging Murder and Aggravated Robbery (See Petition for Writ of Certiorari, Appendix at p. A14).

The Supreme Court of Ohio affirmed the decision of the Court of Appeals on August 31, 1983, in Case No. 82-657, and found that Aggravated Robbery and Grand Theft were allied offenses of similar import pursuant to Ohio Revised Code Section 2941.25(A) and that since Murder and Involuntary Manslaughter share the common element of causing the death of another and are distinguishable only by the defendant's mental state, the defendant, in any single killing could only be convicted of one offense or the other but not both. In so finding the Court held that

in this case the Double Jeopardy provision prohibiting multiple punishments for the same offense would be violated by further prosecution of the Defendant-Respondent (See Petition for Writ of Certiorari, Appendix at p. A1).

SUMMARY OF ARGUMENT

The opinion adopted by the Ohio Supreme Court, although limited in scope, is broad in its effect. Its holding that the acceptance of pre-trial guilty pleas, at a defendant's behest, of lesser indicted offenses prohibits prosecution on the greater indicted offenses has completely terminated the rights of one litigant—the people of Ohio—in a criminal proceeding. In this respect it is also a broad departure from previous criminal proceedings. Prior to the Ohio Supreme Court's decision, judicial interference with the State's criminal proceeding, i.e., the suppression of evidence or dismissal of charges, was based upon some impropriety or misconduct by the State. In the case at bar, however, the State of Ohio has not acted improperly, and in no instance has it been so accused.

The Lake County Grand Jury has found that probable cause existed to believe that the Defendant-Respondent violated four distinct criminal statutes, and thus returned an indictment on multiple counts. There clearly has been no deprivation of any Constitutionally guaranteed rights of the Defendant-Respondent by returning such an indictment. Further, the State has vigorously opposed the trial court's acceptance of the Defendant-Respondent's plea of guilty to the crimes of his choice. Surely this is not so great an impropriety as to call for the deprivation of the State's rights to one full and complete proceeding.

Where the State has acted properly and there has been no verdict equivalent to an acquittal, the interests of the State must be weighed and balanced against the pro-

tections of the Double Jeopardy Clause intended for the individual. Even when there has been a conviction, the Double Jeopardy Clause is not a complete bar to further prosecution in all cases. There are exceptions to its protections, especially where an accused voluntarily decides to terminate the proceedings prior to a full and complete hearing in an effort to avoid the full penalty for his criminal conduct.

Further, no violation of the Double Jeopardy protections occurs when all of the charges are brought in one proceeding and cumulative sentences can be avoided by judicial order or pursuant to State statutes. The Defendant-Respondent can, in this case, be tried and convicted for Murder and Aggravated Robbery, and any sentence which does not exceed the maximum allowable for those offenses will not subject the Defendant-Respondent to multiple punishment. The most that may be required is that the Defendant-Respondent receive credit for time served on the lesser offenses.

In addition, double jeopardy is not applicable to Murder and Involuntary Manslaughter. The fact that an offense may, in some instances, be proved while proving the greater offense does not mean that double jeopardy prohibits further prosecution. Pursuant to *Blockburger v. United States*, 284 U.S. 299 (1932), before double jeopardy prohibits further prosecution, the elements of the two offenses must correspond to such a degree that the facts necessary to prove one will, as a matter of course, prove the other. That is not the case with these two Ohio homicide charges.

ARGUMENT

I. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution Does Not Prohibit Continued Prosecution in a Multi-Count Indictment When the Defendant Persuades the Trial Court, Over the Objections of the State, to Accept Pleas of Guilty to the Less Severe Charges. Unless There Has Been a Verdict of Acquittal or Its Equivalent, the Question of When Double Jeopardy Bars Further Prosecution Must Be Decided by Weighing and Balancing the Intended Projections of the Provision Against the Rights and Interests of the State.

The Grand Jury in the United States and Ohio has long been recognized as an inquisitorial body whose object is the detection and punishment of crime. *Beavers v. Henkel*, 194 U.S. 73 (1904); *Levine v. United States*, 362 U.S. 610 (1960). Initially established in England as a device to accuse and try wrongdoers, it eventually evolved a further purpose as a barrier against royal persecution. When adopted in this country, the Grand Jury's duty surfaced as a dual role of bringing wrongdoers to justice while serving as a protection against unfounded and unreal accusations. *Hurtado v. California*, 110 U.S. 516 (1884).

Although the "due process" clause of the Fourteenth Amendment does not make the Fifth Amendment Grand Jury requirement applicable to the states,[1] Article I, Section 10 of the Constitution of the State of Ohio sets forth the establishment of the Grand Jury within Ohio.[2]

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1. See, e.g. *Lem Woon v. Oregon*, 229 U.S. 586 (1913)

2. *Article I, Section 10, Ohio Constitution*: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger,

(Continued on following page)

Refinement of the responsibilities of Ohio Grand Juries are statutorily set forth in Section 2939.06 and 2939.08 of the Ohio Revised Code (Brief Appendix at A5). Pursuant to said sections, it is the duty of each Grand Jury member to "diligently inquire, and true presentment make" of all matters and things presented.[3] Further, it is the duty of the Grand Jury as a whole to "proceed to inquire of and present all offenses committed within the county" where they are situated.[4]

This statutory authority coincides with the generally recognized principle in Ohio that the Grand Jury powers of investigation and authority to make general findings are comparatively without limit. *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920).

A consistently repeated dilemma facing Grand Juries is what to do when there is probable cause to support more than one theory as to how a defendant committed an offense, and each theory may dictate a different charge. Adhering to the concept of broad Grand Jury indictment authority, the Ohio General Assembly has adopted legislation that alleviates the aforementioned predicament. Ohio Revised Code Section 2941.25 (A) provides:

> "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain

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Footnote continued—

and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. . ."

3. *Ohio Revised Code Section 2939.06*

4. *Ohio Revised Code Section 2939.08*

counts for all such offenses, but the defendant may be convicted of only one."

Thus, if evidence is presented to the Grand Jury which establishes probable cause concerning two or more theories as to how a defendant committed an offense, the Grand Jury is free to indict on the varying charges stemming from the different theories.

When such an indictment is presented by the Grand Jury, the burden as to the election of which charge is to be pursued lies with the State. Such election does not have to be made until after the defendant has been tried on the two or more charges. The courts in Ohio have recognized that it was the Ohio General Assembly's intent to leave the issue of election solely to the prosecution, and that said election could be made at any time, including after the jury has returned a verdict, so long as the election was prior to conviction and sentencing. See, e.g., *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 344 N.E. 133 (1976); *State v. Osborne*, 49 Ohio St. 2d 135, 359 N.E.2d 78 (1976); *State v. Weind*, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977).[5]

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5. The Ohio cases cited support the concept enunciated by the Ohio Supreme Court in *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 344 N.E.2d 133 (1976), when, in dealing with one indictment charging both Grand Theft and Receiving Stolen Property arising out of the same transaction, the court stated the following: "This case does not involve common law distinctions or constitutional principles, but statutory construction and intent. Accordingly, the intent of the General Assembly controls in this case, and that intent is plainly expressed in Ohio Revised Code Section 2941.25, *supra*, and the accompanying committee comment. Although 'receiving' is technically not an included offense of theft, it is, under Ohio Revised Code Section 2941.25, an 'allied offense of similar import.' An accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *City of Maumee v. Geiger*, 45 Ohio St. 2d at 244 (1976).

In the instant case, the Lake County, Ohio, Grand Jury was presented with the facts surrounding the shooting death of Thomas Hill. After the presentation of evidence, the Grand Jury, pursuant to its statutory authority, indicted the Appellee herein for the offenses of Murder and Involuntary Manslaughter, as well as Aggravated Robbery and Grand Theft. The homicide offenses, arguably considered to be allied and of similar import, were based upon different theories of how the Appellee committed the same act. After said indictment was presented, it was up to the prosecutor, and the prosecutor only, to determine which count would be pursued to conviction and sentencing. This is entirely proper since the State, like any litigant, ought to be entitled to have a trier of fact determine which theory is correct. When the Defendant-Respondent herein intervened by attempting to enter a plea of Guilty to the charge of Involuntary Manslaughter, he was improperly circumventing the authority the Ohio General Assembly had granted to the State in the prosecution of offenses. Since the trial court was not obligated to accept Defendant's plea pursuant to Ohio Rules of Criminal Procedure, Rule 11(C)(2) (Brief Appendix at A2), the trial court's acceptance of Defendant-Respondent's plea was erroneous. The trial court also erroneously found that double jeopardy precluded the State from pursuing the properly indicted Murder and Aggravated Robbery charges against the Defendant-Respondent. Since the Grand Jury acted properly in issuing the indictment herein, and since the State had the right to determine which charge it would pursue to conviction and sentencing, and because double jeopardy does not mandate otherwise, the decision of the trial court was erroneous.

The State of Ohio has obviously acted in a manner consistent with the Constitution of the United States and

the State of Ohio. Having done so the people of Ohio should have been able to expect at least one full and complete opportunity to present the facts and issues of their lawsuit to a trier of fact. Any litigant in any lawsuit in the United States could expect no less from a court. Prior to this case in the area of criminal proceedings, only when the State has acted improperly have its lawsuits been scrutinized or inhibited, i.e., by the suppression of certain evidence or the dismissal of charges. In the case at bar, however, a court of law has completely terminated the State's rights to proceed to one full and complete trial and present evidence and place at issue the facts and the law. Surely this was not the intended purpose of the Double Jeopardy provision of the Fifth Amendment.

Indeed, since the State of Ohio has acted properly and in full faith and compliance with the laws, its rights in this litigation must be recognized and protected. If the Defendant-Respondent's concept of the Double Jeopardy Clause is correct, then an accused has—with the acquiescence of the trial judge—plenary powers over the disposition of the opposing litigant's presentation of the facts. The accused can effectually terminate a major portion of the criminal proceedings against him, or inhibit the Grand Jury's executive powers.

Prior to the Ohio Supreme Court's decision, no defendant has ever been permitted the privilege of so complete a suppression of the public's interest. It has long been recognized that the Government has valid interests in a complete presentation of its cases to a tribunal.

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the Tribunal which the

Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24 at 36 (1965).[6]

This recognition of the people's rights to fully participate in at least one full and complete criminal proceeding has been consistently echoed in a variety of situations.

In *Arizona v. Washington*, 434 U.S. 497 (1978) this Court stated "as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. at 505.

Similarly, in *Illinois v. Somerville*, 410 U.S. 458 (1973), this Court again considered the public's rights or interests in relation to an accused's protections pursuant to the Fifth Amendment's Double Jeopardy Clause. The trial court, in *Somerville*, had declared a mistrial over the defendant's objections, and the defendant argued that, since jeopardy had attached when the jury was impaneled and sworn, a second trial constituted double jeopardy. This Court disagreed, finding that the trial court's action was proper, and ruled the following concerning the public's interest:

"The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude

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6. It is pertinent to note that the issues presented to the United States Supreme Court in *Singer* involved an accused who attempted to waive a jury trial over the objections of the Government's attorney. This court ruled, "We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial." *Singer v. United States*, 380 U.S. at 26. Furthermore, the Defendant-Respondent has not presented any authority which indicates that under the common law defendants had the right to avoid trial altogether by pleading guilty.

> the vindication of that interest. This consideration, whether termed the 'ends of public justice . . ., or, more precisely, the public's interest in fair trials designed to end in just judgments' . . ., has not been disregarded by this court." *Illinois v. Somerville*, 410 U.S. at 463.

The above-cited case can, obviously, be factually distinguished from the case at bar. In *Somerville*, there had been no verdict, either of acquittal or conviction. In the case at bar, the defendant has plead guilty and been convicted of two crimes. Despite this factual distincton, the above-cited case establishes and supports the principle that the people of Ohio are litigants in a legal proceeding, and, as such, they have rights and expectations which must be weighed and considered before a court can dismiss a criminal charge on the basis of double jeopardy. The rights and expectations of the people must, generally speaking, be weighed and considered in relation to the constitutionally protected rights of the Defendant-Respondent, although there is a situation in which the people are absolutely barred from continuing a prosecution, i.e., where the defendant has received a verdict equivalent to an acquittal. *United States v. Ball*, 163 U.S. 662, 671 (1896).

Barring an acquittal or conviction after a complete trial, the Double Jeopardy Clause was not intended to shield an accused from a legitimate criminal prosecution of the State. The Double Jeopardy prohibitions are aimed at "oppressive practices" by the State. *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

This concept was echoed and more completely discussed in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) where this Court ruled that "at the heart of this policy [double jeopardy provision] is the concern that permitting the sovereign freely to subject the citizen to a

second trial for the same offense would arm Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. at 569.

In addition to restricting State misconduct, it has a further and related purpose of sparing the accused the emotional and financial ordeal of being subjected to multiple trials:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazard of trial and possible conviction more than once for an alleged offense. . .
>
> The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187, 188 (1957).

Significant in its absence is any mention that the State is prohibited from prosecuting at least one full and complete criminal proceeding.

The Double Jeopardy provision has, in addition to and related to those purposes cited in *Green* and *Hunter*, another concern that is "central to the objective of the provision". That is that the State should not have a second opportunity to muster evidence which it failed to present at the first proceeding. *Burks v. United States*, 437 U.S. 1, 11 (1978).

The provision's broad motivating force is to assure that "principles of fairness and finality" be imposed on criminal proceedings in the United States. *United States v. Wilson*, 420 U.S. 332, 343 (1975).

The Defendant-Respondent in the case at bar is requesting finality, but he is not asking for fairness. He is, in fact, demanding quite the opposite. The Defendant-Respondent is seeking to impose a highly restrictive and rigid rule on the courts of Ohio, and thereby avoid the full consequences of his criminal acts. Deeply disturbing is the absence of any objectively practical or humane gains which this rule would bring to this area of law. The Defendant-Respondent, of course, would highly benefit from the adoption of such a rule, but his interpretation of the Double Jeopardy Clause would mandate that the State's expectations of equity and fairness be denied and that the State not be allowed to have one complete and lawful opportunity to present its case to a trier of fact. There is no case law that supports such an inequitable proposition. Quite the contrary, the case law strongly mandates that the State be allowed at least one opportunity to present its case; in addition to the previously cited cases is the following:

> ". . . [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal law." *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Can this "very vital interest" of the State be vindicated in a proceeding in which the accused is permitted to persuade the trial court, over the State's objections, to accept pleas of guilty to the crimes of his choice? Surely

the Double Jeopardy provision of the Fifth Amendment was not intended to extend this type of luxury to a criminal defendant.

It is in light of the expectations and rights of the public and the intended purpose of the Double Jeopardy provision that this Court must decide whether or not the State of Ohio is barred from continuing the prosecution of this defendant. The fact that this defendant has been placed in jeopardy is not, in and of itself, determinative since "The conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Serfass v. United States,* 420 U.S. 377, 390 (1975).

The question of when the Double Jeopardy provision does bar continued prosecution is not subject to rigid standards, as first established in *United States v. Perez,* 22 U.S. 579 (1824). In that particular case the trial court had, without the consent of either defendant or Government, discharged a deadlocked jury. At the second trial the defendant claimed that double jeopardy prohibited a continued prosecution. The United States Supreme Court disagreed, ruling:

> "We think, that in all the cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. . ." *United States v. Perez,* 22 U.S. at 580.

That decision has been the basis for later decisions by the United States Supreme Court concerning issues of

double jeopardy. This Court has consistently refused to adopt any "rigid formula" to resolve such issues. *Wade v. Hunter*, 336 U.S. at 690.

The instances in which continued prosecutions have been permitted have been numerous, *United States v. Perez* being merely the first of many. A new trial is permitted following the defendant's successful appeal of his conviction, *United States v. Ball*, 163 U.S. at 672 (1896); where a mistrial has been declared from the manifest necessity caused by a military advance, *Wade v. Hunter*, 336 U.S. at 688; where the defendant has requested a mistrial in the absence of judicial or prosecutorial overreaching, *United States v. Dinitz*, 424 U.S. 600 (1976); or where an indictment is dismissed at the request of the defendant and in a situation functionally equivalent to a mistrial, *Lee v. United States*, 432 U.S. 23 (1977).

It is irrational to assume, in the light of these cases, that the Double Jeopardy provision bars a continued prosecution when all the charges against an accused are brought in one proceeding and he persuades the trial court to accept his plea of guilty to the crimes of his choice. This is conceptually inconsistent with the holdings of the cases in which continued prosecutions are permitted.

Many of these cases which permit continued prosecution utilize a weighing and balancing test. In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court dealt with a fact situation in which the defendant had been tried and convicted of murder but granted a new trial because the State had withheld exculpatory evidence from the defense. At the beginning of the second trial the defense counsel improperly alluded to the State's withholding of evidence during the first trial. The trial judge granted the State's Motion for Mistrial based upon that improper

comment. This Court, dismissing a double jeopardy argument, upheld a third trial and conviction, stating that an accused's:

> ". . . valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecution one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington,* 434 U.S. at 505.

The issue of a second trial after jeopardy had attached was also dealt with in *Wade v. Hunter.* In that case an American soldier in Germany was accused of rape and placed on trial before a court-martial. After evidence was presented, but before a verdict was reached, the trial was terminated. This termination was due to ever increasing distances between the court and the witnesses caused by a rapid military advance. The accused was later tried and convicted. He appealed on the grounds of double jeopardy. This Court ruled that double jeopardy did not bar the re-trial and conviction stating:

> "The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter,* 366 U.S. at 688, 689.

Neither *Arizona v. Washington*, nor *Wade v. Hunter* involves an adjudication of guilty by plea. Both cases, however, speak of a necessary weighing and balancing test between the constitutionally intended protection of the Double Jeopardy provision and the public's interest in a complete and just proceeding. And the decisions of the United States Supreme Court have consistently held in favor of the State when the defendant himself has voluntarily sought to terminate his trial without having his guilt or innocence submitted to either judge or jury.

In *United States v. Scott*, 437 U.S. 82 (1978), this Court dealt with a fact situation roughly similar to the case at bar. In *Scott* the defendant was charged with a three count narcotics indictment. Before, and twice during his trial, the defendant moved to dismiss two counts on the grounds that his defense had been prejudiced by pre-indictment delay. At the close of all the evidence the trial court granted the defendant's Motion. The jury returned a verdict of guilty on the third count. The Government sought to appeal the dismissed counts, and the defendant opposed this appeal, arguing that any further prosecution was barred by double jeopardy.

This Court dealt with the issue in depth, dealing first with the issue of mistrials in several different situations but ruling the following concerning *Scott*:

> "Where, . . ., a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution." *United States v. Scott*, 437 U.S. at 93.

This Court then went on to consider the relationship between the Double Jeopardy Clause and reprosecution when a defendant has successfully persuaded the trial

court to terminate part of the proceedings in his favor before any factual determination of guilt or innocence. This Court first re-evaluated its position in *United States v. Jenkins*, 420 U.S. 358 (1975),[7] and went on to adopt the following position:

> "Upon fuller consideration, we are now of the view that this language from *Green*, while entirely appropriate in the circumstances of that opinion, is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution. It is quite true that the Government . . . should not make repeated attempts to convict an individual . . . But that situation is obviously a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empanelled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all powerful State relentlessly pursuing a defendant

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7. *United States v. Jenkins*, 420 U.S. 358 (1975), involved a defendant who was indicted on a charge of violating 50 USCS Appx § 462(a) by knowingly refusing to submit to induction into the armed forces. Jenkins had applied for a conscientious objector status the day before he was to report for induction, but was refused a postponement of his induction date. He failed to appear and he was subsequently indicted. Both before and during his bench trial, Jenkins moved to dismiss the charges against him. At the close of the evidence, the Court filed written findings of fact and conclusions of law and directed that the indictment be dismissed. The record did not, however, disclose whether there was or was not a resolution of the factual issues. This Court ruled that:

> ". . . [I]t is enough for purposes of the Double Jeopardy Clause, and therefore, for the determination of appealability under. . . That further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." *United States v. Jenkins*, 420 U.S. at 370.

It was this issue which this Court addressed in *Scott*.

who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *United States v. Scott*, 437 U.S. at 96.[8]

Quite simply, this Court ruled that double jeopardy "does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. at 99. It was the Defendant-Respondent in the case at bar who voluntarily decided to enter pleas of guilty to the crimes of his choice. Unlike *Scott*, however, the Defendant-Respondent has undertaken his course of action only prior to trial and in a blatant attempt to use the Double Jeopardy provision as a shield against being fully prosecuted for his crimes.

Scott is roughly analogous to the case at bar, but *Jeffers v. United States*, 432 U.S. 137 (1977) is even more applicable. Garland Jeffers was indicted for one count of conspiring, together with nine co-defendants, to distribute heroin and cocaine. In a separate indictment he was also charged individually with conducting a "continuing crim-

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8. This Court referred to the following quote from *Jenkins*:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make *repeated attempts* to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . *Jenkins*, supra, at 370, 43 L. Ed. 2d 250, 95 S. Ct. 1006, quoting *Green*, 355 U.S., at 187, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR 2d 1119." *United States v. Scott*, 437 U.S. at 95.

inal enterprise", in concert with five or more others to distribute cocaine and heroin, and that as a result of such activity he had derived a substantial income. The Government, prior to trial, moved to consolidate these two indictments. The trial court refused to do so, however, based upon the Defendant-Respondent's objections to joinder. The defendant had argued that the statutes were dissimilar. The defendant was convicted by a jury of the first indictment, following which he moved to dismiss the second indictment on the grounds of double jeopardy. This Motion was denied by the trial judge and the defendant was again convicted. He appealed, again on the grounds of double jeopardy.

This Court upheld the second conviction without, however, reaching a majority opinion concerning the impact of the defendant's voluntary action in bifurcating his two prosecutions. Four of the Justices of this Court, however, adopted the following position:

> "If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown rule emerges. This situation is no different from others in which a defendant enjoys protections under the Double Jeopardy Clause, but for one reason or another retrial is not barred. . . . Similarly, although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers v. United States*, 432 U.S. at 152.

These same Justices went on to hold that where a defendant "was solely responsible for the successive pros-

ecutions", his voluntary conduct "deprived him of any right that he might have had against consecutive trials." *Jeffers v. United States*, 432 U.S. at 154. The above four Justices constituted a majority because Mr. Justice White concurred on the basis that *Iannelli v. United States*, 420 U.S. 770 (1975) was controlling.

The four remaining Justices dissented and argued that double jeopardy did protect Jeffers. Their dissent, however, seems to focus on their perception of misconduct by the Government:

> "I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.
>
> The defendant surely cannot be held responsible for the fact that two separate indictments were returned, or for the fact that the defendants were named in the earlier indictment, or for the fact that the Government elected to proceed to trial first on the lesser charge." *Jeffers v. United States*, 432 U.S. at 158, 159 (footnote deleted).

This concern with the Government's misconduct is further evidenced by footnote 2 of the above cited passage which reads:

> "The plurality implies that the result in this case would be different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. . . . I wonder how the grand jury happened to return two separate indictments." *Jeffers v. United States*, 432 U.S. at 159.

None of the facts that concerned the dissenters in *Jeffers* is present in the case at bar. In this particular instance, the State of Ohio has acted properly. Any suc-

cessive or bifurcated prosecution has been caused by the defendant's voluntary act, and when the intended purposes of the Fifth Amendment's Double Jeopardy provision are weighed and balanced against the rights and expectations of the people of Ohio, it is our contention that this fact situation—like others previously cited—constitutes an exception to the protections of the Double Jeopardy Clause.

II. Application of the Double Jeopardy Clause and State Criminal Code Provisions in Any Single Criminal Proceeding Containing a Multiple Count Indictment of Greater and Lesser Included Offenses Precludes Only the Imposition of Consecutive or Cumulative Sentences for Both Offenses. The Court Below Erred in Holding That the Constitution Bars Continuation of a Single Proceeding to Trial on the Greater Offenses, Where the Defendant Has Persuaded the Trial Court to Honor His Election to Plead Guilty to the Lesser Offenses Over the State's Objection.

The Supreme Court of Ohio has held below that the prohibition against multiple punishments, one of the three protections of the Double Jeopardy Clause, precludes the State of Ohio from continuing its prosecution of a single, multiple count indictment, containing arguably greater and lesser included offenses, because the Defendant-Respondent persuaded the trial court to accept his guilty pleas to the lesser indicted offenses. It reaches that conclusion notwithstanding the State's vehement opposition to the Defendant-Respondent's ploy.

At the outset it should be noted that in a sense the case presents a novel approach to criminal defense tac-

tics. That tactic converts a Constitutional protection into an offensive Constitutional weapon in an obvious attempt to avoid full responsibility and punishment for criminal conduct.

That this tactic is novel is not surprising in light of the fact that historical and legal analysis has consistently adhered to the basic principle that a criminal defendant is to be protected against governmental overreaching and impropriety in its attempts to secure convictions (See Argument I) and has always been the paramount protection of the Double Jeopardy Clause. No such impropriety or overreaching has occurred in this case.

The application of the Double Jeopardy protection against multiple punishments to these facts creates a novel issue for this Court. Previous cases involving multiple punishment questions have dealt mainly with re-trial and re-sentencing of defendants following appellate reversals of convictions. Such was the background of *North Carolina v. Pearce*, 395 U.S. 711 (1969) upon which the majority of the Ohio Supreme Court based its decision below. Its decision is based upon its erroneous interpretation of this Court's language that the guarantee against double jeopardy, inter alia:

> ". . . protects against multiple punishments for the same offense." *Pearce*, 395 U.S. at 718 (footnote and citations omitted).

This Court held that the protection against multiple punishments required that, upon re-conviction for the same offense following reversal of the original conviction, credit for the time served upon that original conviction must be given, *Pearce*, 395 U.S. at 718. This Court also held that the Double Jeopardy Clause of the Constitution did not absolutely bar imposition of a harsher sentence upon re-trial and re-conviction of a defendant following his

successful appeal of his original conviction, *Pearce*, 395 U.S. at 723. Other cases involving multiple punishment questions have dealt with the ability of the trial courts to impose consecutive sentences upon greater and lesser included offenses, in one proceeding, *Whalen v. United States*, 445 U.S. 684 (1980).

The Supreme Court of Ohio goes too far, however, in holding that the protection against multiple punishments precludes the State from seeking, in one criminal proceeding, a conviction and a punishment which does not exceed the maximum allowable for the greater offenses. Such has never been prohibited by this Court's pronouncements dealing with multiple punishments. There can be no question that a State may require a defendant to fully answer for his criminal conduct in a single criminal proceeding. The State may also seek conviction and full punishment for greater offenses where a defendant has an earlier conviction set aside, unless there has been an acquittal of that greater charge at the first trial, *Green v. United States*, 355 U.S. 184 (1957).

The proposition that the Double Jeopardy Clause protects against multiple punishments for the same offense was not new at the time of this Court's holding in *Pearce* and dates at least as far back as this Court's decision in *Ex Parte Lange*, 85 U.S. 163 (1874). In that case the defendant had been indicted for, tried and found guilty of appropriating to his own use mailbags belonging to the Post Office. The punishment provided for by that statute was imprisonment for not more than one year *or* a fine of not less than Ten Dollars nor more than Two Hundred Dollars. The trial court sentenced the defendant to one year in prison *and* a Two Hundred Dollar fine. Four days after being committed to prison the defendant paid his fine in full. The day after his fine was paid he was again

brought before the trial court which issued an order vacating the former judgment, and the defendant was again sentenced to imprisonment from that later date. The defendant then sought and was granted review via Writ of Habeas Corpus.

It must be noted that in the *Lange* case the defendant had been tried and convicted of one specific statutory offense. That offense carried with it a penalty of imprisonment *or* a fine, but not both. Further, the trial court resentenced the defendant to a maximum term of imprisonment five days after he had commenced serving the term on the original judgment and also after his fine had been fully paid. The Court held that such procedure obviously punished the defendant twice for one violation of a single statute.

Procedurally, the case at bar is distinguishable from *Lange*. Here the Defendant-Respondent has been indicted by the Grand Jury for violating four separate and distinct criminal statutes. No trier of fact has been called upon to resolve any issues of fact. Nor does the State seek any more punishment than that which is warranted in this single proceeding. The rule announced in *Lange*, however, cannot be taken to constitute an absolute bar preventing the State from seeking full punishment for criminal conduct in a single criminal proceeding. See *United States v. DiFrancesco*, 449 U.S. 117 (1980).

In *Brown v. Ohio*, 432 U.S. 161 (1977) this Court addressed the issue of the protection against multiple punishments as related to imposing punishments for violations of more than one statute in one proceeding:

> "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed

its legislative authorization by imposing multiple punishments for the same offense." *Brown* at 165.

The Court also went on to add that:

"Where the judge is forbidden to impose *cumulative punishment* for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown* at 166 (emphasis added).

It is clear from the Court's language in *Brown* that in any one proceeding the Constitutional protection against multiple punishments bars *only* the imposition of consecutive sentences for violations of statutes that are determined to be the same offense pursuant to the rule of *Blockburger v. United States,* 284 U.S. 299 (1932), See *Gore v. United States,* 357 U.S. 386 (1958) and *Bell v. United States,* 349 U.S. 81 (1955).

The logical result which flows from the preceding statements of this Court is that in any one criminal proceeding a prosecutor may demand full punishment of a defendant for criminal activity which violates two or more statutes with the only constitutional limitation upon punishment being the prevention of imposing consecutive sentences upon convictions for two or more offenses which are the "same" pursuant to *Blockburger.*

Thus, in the case at bar the only Constitutional limitations upon punishment of this Defendant-Respondent for the offenses of Murder and Aggravated Robbery would be grounded upon a determination of whether the greater and lesser offenses are the same pursuant to the "Blockburger" test. Reliance upon such a test, however, does not in any Constitutional sense preclude the State of Ohio from continuing its prosecution of the Defendant-Respondent and seeking the full punishment legislatively au-

thorized for the greater offenses. This conclusion is inescapable in light of the *Jeffers* case.

In *Jeffers* the defendant had been charged in separate indictments for violations of separate and distinct criminal statutes. That defendant opposed the Government's motion to consolidate the indictments. The defendant was first tried, convicted, and sentenced to the maximum penalty of fifteen years in prison and a fine of $25,000 on the lesser offense of conspiracy. The defendant was later tried, convicted, and sentenced to a maximum punishment of life imprisonment and a fine of $100,000 for the greater offense of conducting a continuing criminal enterprise arsing out of the same facts used to convict the defendant of the lesser offense. That sentence was to run consecutively with the earlier sentence. This Court affirmed both convictions and sentences with one important exception.

The Court concluded that the imposition of fines totalling $125,000 violated the prohibition against multiple punishment as the total maximum fine that could be imposed for the greater offense was $100,000. Absent a clear legislative intention to authorize consecutive or cumulative punishments, any fine in excess of the maximum would violate the prohibition of multiple punishments if there were any possibility that the two offenses the defendant had been convicted of were the same for double jeopardy, i.e., "Blockburger" purposes. *Jeffers*, 432 U.S. at 155, 158.

Four Justices of this Court upheld the imposition of the life sentence imposed upon the greater offense notwithstanding the fact that the sentence came at a later time, due to the actions of the defendant. It is clear from *Jeffers* that nothing in the Double Jeopardy Clause prohibits the imposition of any sentence authorized for the greater offense even though it may be imposed at a time

following a conviction and sentence for a lesser included offense, where the separate sentencing is dictated by a course of action elected by the defendant.

The case at bar is, however, on all fours with *Jeffers* with the notable exception that in *Jeffers* the government returned separate indictments of arguably greater and lesser included offenses. This fact did not go unnoticed by Justice Stevens in writing the dissent in that case. *Jeffers*, 432 U.S. at 159 and Footnote 2.

With regard to any multiple punishment problems generated by this case, *Jeffers* would permit a trial and imposition of greater punishment on the greater offenses. *Pearce* and *Lange* do not prohibit greater sentences upon conviction of the greater offenses since the State had the right to try the Defendant-Respondent upon the greater offense in a single criminal proceeding.

> "Since the Government had the right to try petitioner on the § 848 indictment (the greater offense), the court had the power to sentence him to whatever penalty was authorized by that statute." *Jeffers*, 432 U.S. at 157 (parenthesis added).

It seems inescapable that a defendant's right to be protected against multiple punishments is not invoked where the defendant's actions necessitate separate sentencing and there is no imposition of cumulative or consecutive sentences for both offenses. Such is the case when during the normal course of events a defendant is tried in one trial of greater and lesser included offenses and a jury renders guilty verdicts upon both charges. The convictions are then merged even though there have been separate pronouncements of guilty by the trier of fact.

Further, any adverse collateral consequences of the convictions for the lesser offenses in the case at bar may

be avoided by the Defendant-Respondent, by resort to Section 2953.21 of the Ohio Revised Code, Petition to vacate or set aside sentence (See Petition for Writ of Certiorari, Appendix at A28).

The Supreme Court of Ohio recognized that cumulative punishments for greater and lesser offenses are prohibited. Cumulative sentences are by definition the same as consecutive sentences and are those sentences which are to take effect after another sentence has been served, BLACK'S LAW DICTIONARY, 276, 343 (5th ed. 1979). In the case at bar, convictions and sentences which encompass the prior sentences for the lesser indicted offenses would not necessarily involve *cumulative* or multiple punishments in any constitutional sense. It also follows that if cumulative sentences cannot be imposed for these offenses, *Pearce* requires no more than that this Defendant-Respondent be given credit for all time served on the lesser offenses pursuant to either Section 2967.191 of the Ohio Revised Code, Reduction of minimum and maximum sentence (Appendix, Petition for Writ of Certiorari at p. A29), or the judicial order of the trial court. This all assumes, of course, that the single prosecution of the Defendant-Respondent culminates with convictions for the greater offenses.

It is clear then that none of the Constitutionally guaranteed protections of the Fifth Amendment prohibit the State of Ohio from continuing its prosecution of the Defendant-Respondent through trial upon the greater offenses of Murder and Aggravated Robbery. Thus, the Ohio Supreme Court erred in concluding that the Defendant-Respondent's election to plead guilty to the lesser offenses, over the State of Ohio's objections, prohibited continuation of his prosecution to trial. It should suffice to say that the Double Jeopardy protection protects a defendant from being twice punished for the same offense, and that a de-

fendant charged in a multiple count indictment, who is convicted and sentenced to any term not exceeding the maximum for the greater offense, is not being punished twice, where the sentence for the greater offense encompasses the sentence for the lesser by crediting time served, and particularly where the State has persistently attempted to accomplish prosecution in one criminal proceeding. If this Court were to affirm the "Johnson Gambit" the result would be a perversion of the Double Jeopardy provision, transforming it from a protection, from overreaching by the government, to a weapon, utilized by defendants to avoid vigorous and proper prosecution.

III. Murder as Defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as Defined in Ohio Revised Code Section 2903.04 Are Not the Same Offenses for Purposes of Double Jeopardy Protections Where Both Statutes Contain Different Elements and Conviction for Either Offense Would Require Proof of Facts Not Necessary to Sustain Conviction on the Other.

In addition to the previous arguments, this Court must also address the issue of whether Involuntary Manslaughter, in violation of R.C. 2903.04 is a lesser included offense of Murder, a violation of R.C. 2903.02. Murder requires that the accused purposely cause the death of another. Involuntary Manslaughter requires that the accused cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or

only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932). If two crimes are factually distinguishable, the test found in *Blockburger* is satisfied and there is no violation of the right to be free from double jeopardy despite substantial overlap in the elements which must be proven to constitute each of the charged offenses. *Iannelli v. United States*, 420 U.S. 770 (1975). It is a well established principle that a single transaction may support convictions for separate offenses proscribed by different statutes. *Missouri v. Hunter*, 74 L. Ed. 2d 535 (1983); *Albernaz v. United States*, 450 U.S. 333 (1981).

The Involuntary Manslaughter charge in the present case requires that a death be caused as a proximate result of the commission of a misdemeanor. It has never been established which underlying misdemeanor was the cause of death. The Defendant-Respondent may have committed a misdemeanor for which no mental element was required. None of the lower courts have addressed whether the misdemeanor committed involved any mental intent, and without any mental intent required for the misdemeanor, no mental intent is required for the Involuntary Manslaughter conviction. Obviously, the State of Ohio would not be obligated to prove purpose. To prove Involuntary Manslaughter in the present case the prosecution must show a death proximately caused by the commission of a misdemeanor, with or without a mental intent. To prove murder, a "purposeful" intent is required whereas the proof of a separate misdemeanor is not a requisite element. The Involuntary Manslaughter and Murder charges in this case each requires proof of an additional

fact which the other does not. Since separate elements are required, the offenses are two separate offenses pursuant to *Blockburger*.

If the so-called greater offense can be proven without the necessity of including the lesser, or if the lesser includes an element not necessarily to be found in the so-called greater, then they are not of necessity included offenses and are not the same offense for purposes of the protection offered by the Fifth Amendment. *Brown v. Ohio,* 432 U.S. 161 (1977).

The Ohio General Assembly's intent in enacting the multiple count statute, Ohio Revised Code Section 2941.25 (Brief Appendix A5-A6), was to allow for the conviction of only one crime where an individual's immediate motive involved the commission of one offense, but in the course of committing that crime he must, a priori, have committed another offense. *State v. Logan,* 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979). As previously pointed out the commission of a Murder does not, a priori, involve the commission of Misdemeanor-Manslaughter, although it may on occasion. Conversely, the commission of Misdemeanor-Manslaughter does not, a priori, involve the commission of Murder, although it may on occasion also involve some of the elements of the crime of Murder. Therefore, under the Ohio Supreme Court's interpretation in *Logan* of the legislative intent behind the multiple count statute, Murder and Involuntary Manslaughter are separate offenses.

Ohio Revised Code Section 2941.25's application is determined by the statutory construction enunciated in *Blockburger* for identifying multiple punishments for the same offense. The Supreme Court of Ohio repeated the *Blockburger* Standards when it ruled:

> ". . . [I]n order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed. The offenses and their elements must correspond to such a degree that the commission of the one offense will result in the commission of the other." *State v. Logan*, 60 Ohio St. 2d 126, 128, 397 N.E.2d 1345, 1348 (1979).

The analysis of the Ohio Supreme Court sub judice consisted of a mechanical application of the *Blockburger* test which resulted in an erroneous ruling. This same application, if correct, would have caused a different result in *Illinois v. Vitale*, 447 U.S. 410 (1980). There, this Court applied *Blockburger* and held that where a defendant, whose automobile struck and killed two children, was convicted for failing to reduce speed to avoid the accident, the double jeopardy clause did not prohibit a further prosecution for involuntary manslaughter. This Court ruled:

> "The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." *Illinois v. Vitale*, 447 U.S. at 419.

In *Vitale*, 447 U.S. at 419, the Illinois Supreme Court had mechanically applied *Blockburger* but failed to analyze whether or not it was possible to prove manslaughter by automobile without also proving a careless failure to reduce speed. In the present case the Ohio Supreme Court has made the same mistake in its analysis of the relationship between Murder and Involuntary Manslaughter. The Ohio Supreme Court failed to consider whether or not

Murder could be proved without also proving Involuntary Manslaughter. It can, and Involuntary Manslaughter can be proved without proving the element of purpose required for Murder. In the present case the two offenses are distinguishable, since Murder does not always entail proof of a Misdemeanor which would be required to show Involuntary Manslaughter, and Involuntary Manslaughter does not always require the element of the mental intent required for Murder.

From the above it is clear that the Supreme Court of Ohio misinterpreted *Blockburger* in its Opinion at page eight when it stated that:

> "Involuntary manslaughter involves a lesser mental state as it is a killing which proximately results from the defendant's committing or attempting to commit another offense. It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one. Under the *Blockburger* analysis, the possibility of proving a fact for one offense which is not required under the other is excluded."

The Court failed to recognize that there may be no mental state required to prove misdemeanor-manslaughter. Certain misdemeanors require no mental state, yet an involuntary manslaughter conviction may result. Discharging of a firearm within city limits is one example of a misdemeanor for which no mental state is required. Mentor-on-the-Lake, Ohio, Codified Ordinance §672.12 (Brief Appendix A6).

Since the commission of a misdemeanor does not always constitute a necessary element of murder as a matter

of Ohio law, and neither "purposely" nor any other mental state is always a necessary element of Involuntary Manslaughter as a matter of Ohio law, the conviction of one does not bar prosecution for the other.

CONCLUSION

The decision of the Ohio Supreme Court in the case at bar is an erroneous application of the Double Jeopardy Clause. It is erroneous on several grounds.

The Ohio Supreme Court misunderstood and misapplied the *Blockburger* standard by ruling that Involuntary Manslaughter is a lesser included offense of Murder. The lower Court ruled, in essence, that since the Defendant-Respondent could have had only one purpose or mental intent in shooting Thomas Hill, then the mental intent required for the commission of Involuntary Manslaughter was the same as that required for Murder and the elements of the two offenses corresponded to such a degree that the *Blockburger* test was satisfied. This analysis failed to consider that the mental intent element of the Involuntary Manslaughter depends upon the mental intent element of the underlying misdemeanor which proximately caused the death of the victim. In Ohio, there are misdemeanors which do not require the proof of any mental intent. The two offenses, therefore, require proof of separate and distinct facts. Obviously, on occasion, the facts of an individual case may dictate that proving Murder may also require that the State of Ohio prove Involuntary Manslaughter, but that is not sufficient to invoke the Double Jeopardy protections. Pursuant to

Blockburger, before Double Jeopardy arises the proof of one offense must, a priori, involve the proof of the other.

The Ohio Supreme Court was further in error by ruling that the multiple punishment protections of the Double Jeopardy Clause prohibited further prosecution in this case. When all of the charges are brought in a single proceeding and cumulative and multiple sentences can be avoided pursuant to judicial order or State Statute, then Double Jeopardy does not prohibit continued prosecution.

Finally, the Ohio Supreme Court was in error by applying a rigid standard to the Double Jeopardy provisions. This clause of the Fifth Amendment was intended to prevent the Government from imposing oppressive and unfair practices upon defendants in criminal proceedings. The Government should not be permitted to make "repeated attempts" to convict an individual, but surely where the State acts in a lawful manner it should not be prevented from making at least one attempt to convict the Defendant-Respondent. This is especially so where the accused has elected to bifurcate a single proceeding and persuaded the trial court to honor that election, despite the State's objections.

Clearly, even following a conviction, there are exceptions to the protection of the Double Jeopardy Clause. The case at bar is such an exception. Where the Defendant-Respondent has had all charges brought against him in a single proceeding, and in an effort to avoid the full prosecution of his crimes he persuades the trial court to accept his plea to the crimes of his choice, then Double Jeopardy does not bar further prosecution of the greater charges.

For all the reasons established above, we ask this Court to reverse the decision of the Ohio Supreme Court and remand this case for further appropriate proceedings.

Respectfully submitted,

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APPENDIX

OHIO RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being

readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Amended, eff 7-1-76; 7-1-80

OHIO REVISED CODE

§ 2939.06 Oath to grand jurors. (GC § 13436-3)

When a grand jury is impaneled the court of common pleas shall appoint one of the members thereof as foreman, and shall administer, or cause to be administered, to said jurors an oath in the following words:

"You and each of you do solemnly swear that you will diligently inquire, and true presentment make of all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching the present service; the counsel of the state, your own, and your fellows, you shall keep secret unless called on in a court of justice to make disclosures; and you shall present no person through malice, hatred, or ill will, nor shall you leave any person unpresented through fear, favor, or affection, or for any reward or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding.["]

§ 2939.08 Duty of grand jury. (GC § 13436-5)

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

§ 2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

CONSTITUTION OF OHIO

Article I, Section 10

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing

to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and the jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

MENTOR-ON-THE-LAKE ORDINANCE

672.12 Pointing and Discharging Firearms and Other Weapons.

(a) Except as provided in subsections (c) and (d) hereof, no person shall discharge any air gun, rifle, shotgun, revolver, pistol or other firearm, or make use of any sling or arrow, within the corporate limits of the Municipality.

(b) No person shall, intentionally and with malice, point or aim a firearm at or toward another or discharge a firearm so pointed or aimed.

(c) This section does not extend to cases in which firearms, slings or arrows are used in self-defense, in the discharge of official duty or in justifiable homicide.

(d) This section does not extend to cases in which BB guns and other air guns, or slings or arrows, are used in the confines of dwellings, provided such use is under adult supervision and is approved by the Chief of Police.

(e) Whoever violates any of the provisions of this section is guilty of a misdemeanor of the fourth degree. Punishment shall be as provided in Section 698.02.

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SUPREME COURT, U.S.
FILED
APR 3 1984
ALEXANDER L. STEVAS

No. 83-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON

On Writ of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-904

STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON

On Writ of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The judgment of the Ohio Supreme Court rests on independent and adequate state grounds which precludes review in this Court and requires dismissal of the writ.

In the event jurisdiction is found to be properly lodged here, the Double Jeopardy Clause of the Fifth Amendment (made applicable to the states by the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784) prohibits a further prosecution of the respondent as he has previously been convicted of the same offense.

A.

The Ohio Supreme Court has long adhered to the syllabus rule whereby only the syllabus (a short statement of a point of law) is the law of the case and is the only portion of the decision necessarily commanding the support of a majority of the Court. *State ex rel. Donahey* v. *Edmondson*, 89 Ohio St. 93.

The two syllabi in the case under review fully satisfy the guidelines of *Michigan* v. *Long*, ___ U.S. ___, 77 L.Ed. 2d 1201, by specifically identifying the state grounds that form the basis of the decision. While the first syllabus, regarding the robbery case, is as specific as possible, the second syllabus is uncertain enough to require reference to the opinion.

An examination of the opinion below with regard to the murder-manslaughter charges demonstrates that the judgment is based on the same state grounds that the Ohio Supreme Court explicitly assigned to the first syllabus. References in the opinion to federal constitutional law are in fact extraneous and neither necessary to the decision nor its basis.

Erroneous conclusions of federal constitutional law that appear in the opinion cannot alter the fact that the Ohio court concluded that murder and manslaughter bear the same relationship to one another that aggravated robbery and theft have to each other.

Even correcting the mis-statements of federal law that may be found to exist in the opinion below will not prevent the Ohio Supreme Court from adhering to its former judgment on remand on the basis of the same statute (R.C. § 2941.25) that respondent alleges is the 'adequate and independent' ground relied on originally.

This Court must reject a mechanical, rigid application of *Michigan* v. *Long*, *supra*, that would undermine the independence of state courts.

B.

Kenneth Johnson has been convicted, on his own plea, of killing one Thomas Hill and of stealing his property. The prison sentence on that judgment is presently being carried out and the conviction has long since been final.

The Double Jeopardy Clause protects a person against a second prosecution for the same offense following conviction. *North Carolina* v. *Pearce*, 395 U.S. 711. Without doubt the

respondent is entitled to the full protection of that guarantee since the proposed trial will implicate the "same offense" and will be a second proceeding.

Brown v. *Ohio*, 432 U.S. 161, establishes a constitutional rule that lesser included offenses are the "same offense" for double jeopardy purposes. Ohio has determined on the basis of this case and *State* v. *Wilkins*, 64 Ohio St. 2d 382, that manslaughter, as charged here, is a lesser included offense of murder and, hence, has answered the question of whether they are the "same offense." To force respondent to trial now on murder after he has been convicted of the "same offense" would violate the Fifth Amendment.

The collateral estoppel ingredient of the Double Jeopardy Clause prohibits an attempt by the state to relitigate an "ultimate" fact that was determined by the earlier conviction, to wit: causing the death of Thomas Hill. *Ashe* v. *Swenson*, 397 U.S. 436, *Illinois* v. *Vitale*, 447 U.S. 410.

Despite the fact that these charges all appeared in one indictment, Kenneth Johnson has not taken any action to mandate two *trials*. His fully authorized plea of guilty obviated the necessity of any trial.

The "termination" of the controversy here was based on a determination of guilt and is not analogous in any way to various forms of terminations that come at the behest of the defendant that are unrelated to guilt or innocence. *United States* v. *Scott*, 437 U.S. 82.

Nor did the respondent's plea of guilty put him in the position of one who had asked for two trials. *Jeffers* v. *United States*, 432 U.S. 137. His plea only put him in the position of demanding that he not be subject to a second prosecution after conviction for the same offense.

The State has no independently cognizable "right" to a trial and, inasmuch as it was the organ responsible for the charges being brought as they were, it is not in a good position to complain.

ARGUMENT

I. The Judgment Below Rests On An Independent And Adequate State Ground And This Court Is Without Jurisdiction To Review It

In reviewing judgments from state courts the role of this Court is limited to correcting improper or erroneous interpretations of federal law including federal constitutional law. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. It has been a settled principle, however, that if a state court judgment was both "independent" of any federal consideration and "adequate" under the state's own law to support the conclusion reached by the state court, this Court would not have jurisdiction for further review because any decision on such facts would be advisory only. *Herb* v. *Pitcairn*, *supra*.

In *Michigan* v. *Long*, ___ U.S. ___, 77 L.Ed. 2d 1201, this Court undertook to establish some guidelines and presumptions to make more consistent the ascertainment of whether a particular state court decision rested on federal or state grounds. The initial inquiry is to see if ". . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . ." *Michigan* v. *Long*, *supra*, 77 L.Ed. 2d at 1214.

A second part of the *Long* test, and one which requires a separate analysis, is ". . . when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . ." *Long*, *supra*, it will be presumed to be based on federal law.

Under this doctrine this Court will assume that any case that appears to rest on federal law or has a mixed foundation of state and federal law was, in fact, decided as it was because the state court believed that federal law required it to do so.

On the other hand, *Michigan* v. *Long*, *supra*, makes it clear that if a state court makes a plain, express statement in either its judgment or opinion that state law, rather than federal law, requires the result, this Court ". . . will not undertake to review the decision." *Long*, *supra*, at 1214.

A. The Ohio Supreme Court has made a "plain statement" that at least part of its judgment is based on Ohio law only

This Court has had considerable experience with the rather unique "syllabus rule" of the Ohio Supreme Court. Cf. *Beck* v. *Ohio*, 379 U.S. 89, 93 n.2, *Zacchini* v. *Scripps-Howard*, 433 U.S. 562, 565, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 441-443 n.3. Under this practice, the syllabus defines and describes the points of law decided in any case;[1] it is the law of the case, *State ex rel. Donahey* v. *Edmondson*, 89 Ohio St. 93.

This Court has acknowledged the limitations placed on any Ohio Supreme Court opinion by the syllabus rule. In *Zacchini* v. *Scripps-Howard*, 433 U.S. 562, the court observed that it was the syllabus that required primary analysis: "The opinion syllabus, to which we are to look for the *rule of law used to decide the case*, . . ." (Emphasis added.)

Having stated the proposition, this Court found in *Zacchini*, *supra*, just as it had in *Perkins* v. *Benguet Consolidated Mining*, *supra*, that the basis for the court's judgment was not expressed in the syllabus, and, without more, it could not tell if it was based on federal law, state law influenced by federal law, or only on state law. Because of that *uncertainty*, this Court, relying on *Perkins*, *supra*, examined the opinion of the Ohio Supreme Court which made clear the federal grounds of the syllabus.

In this case, with regard to the respondent's conviction of theft and the subsequent dismissal of the aggravated robbery charge, there is no uncertainty in the syllabus. The Ohio Su-

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[1] "It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all members concurring in the judgment. Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." *Donahey*, *supra*, at 107,8.

preme Court clearly upheld the dismissal of the aggravated robbery on the basis of the Ohio multiple count statute:

> Aggravated Robbery, as defined by R.C. § 2911.01, is an "allied offense of similar import" to theft, as defined by R.C. § 2913.02 (R.C. § 2941.25[A], applied.)

State v. *Johnson*, 6 Ohio St. 3d 420, Syllabus One.

The multiple count statute, R.C. § 2941.25[A], (Brief of Petitioner, pp. A-5, 6) provides that if the "same conduct by a defendant can be construed to constitute two or more allied offenses of similar import," the defendant can be *indicted* for all of them but can be *convicted* of only one. The statute makes no reference to the manner of the conviction (i.e. trial or plea) and it does not make any reference to the sequence (i.e. which of two or more allied offenses produced the first conviction).

The Ohio Supreme Court has held in this case and in *State* v. *Logan*, 60 Ohio St. 2d 126, that the two offenses in question must correspond to such a degree that the commission of one will automatically "result in the commission of the other." *State* v. *Johnson*, *supra*.

Under Ohio law then, the unlawful taking of property will constitute theft; the unlawful taking of property while armed with a weapon will constitute aggravated robbery.[2] Where the same property and the same event are implicated, it is plain that a person cannot commit an aggravated robbery without simultaneously committing theft. *State* v. *Logan*, *supra*, and *State* v. *Harris*, 58 Ohio St. 2d 257.

The syllabus rule indicates that the court, as distinguished from the opinion writer, found that two of the counts in respondent's indictment were "allied offenses of similar import."

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[2] R.C. § 2913.02 provides: "No person, with purpose to deprive the owner of property . . . shall knowingly obtain or exert control over [it]"

R.C. § 2911.01 provides: "No person, . . . in committing a theft offense . . . shall do either of the following: (1) Have a deadly weapon . . . on or about his person. . . ."

Since that language appears in the Ohio statute and since the Ohio court exlicitly said in the syllabus that it was 'applying' that statute, its affirmation of the judgment below is obviously based on Ohio law only.

It took no new theory for the Ohio court to reach this conclusion. In *State* v. *Harris*, *supra*, the Ohio Supreme Court had held that the underlying theft was an "allied offense of similar import" to unarmed robbery. Where the same theft is transformed into aggravated robbery by the presence of a gun, it is clearly an 'allied offense of similar import' to the aggravated robbery.

This case is likewise free from the troubling questions that may arise when a state court appears to be relying on one of its earlier precedents but that precedent itself was influenced by federal law. Here the Ohio Supreme Court interpreted and relied on a state statute and specifically said so.

B. The first syllabus of the Supreme Court of Ohio's decision is independent of federal law and adequate to support the judgment

Ohio has provided more protection for defendants charged with multiple counts of the "same offense" than is required by the Double Jeopardy Clause. By enacting the multiple count statute the legislature intended to avoid arcane questions of double jeopardy law and reduce the potential for oppressive prosecutions.

The Legislative Service Commission comment to R.C. § 2941.25 makes the legislative intent clear: "The basic thrust of the section is to prevent 'shotgun' convictions." (comment to House Bill 511, 134 vH511, 1974.)

The Double Jeopardy Clause is not violated by charging a person with greater and lesser offenses in an indictment and it is not violated by convictions on all of them in a single trial. *Brown* v. *Ohio*, 432 U.S. 161, 166.

At that point, the Double Jeopardy Clause only requires that the court not impose multiple punishments for the same offense. Since a greater and lesser are the "same offense" under *Brown*, a trial court cannot impose a sentence for the lesser offense to be run after the sentence for the greater.

A further exception to the protection offered by the multiple punishment prong of the Double Jeopardy Clause exists in that the legislature may specifically authorize cumulative punishment for the "same offense" where the convictions are had at one trial. *Missouri* v. *Hunter*, ___ U.S. ___, 74 L.Ed. 2d 535 at 543.

Therefore, the protections afforded by the Double Jeopardy Clause do not prohibit more than one 'conviction' for the same offense in the same proceeding and in cases where the legislature has authorized cumulative punishments, they are likewise not constitutionally improper.

Ohio has specifically opted for a more restrictive approach to the issue of multiple crimes. There are three distinct differences between the Ohio statute (R.C. § 2941.25) and anything this Court has ever held that the Double Jeopardy Clause requires.

First, the test of "allied offenses of similar import" is much broader and more inclusive than tests so far for the "same offense." In *State* v. *Logan*, 60 Ohio St. 2d 126, the Supreme Court considered R.C. § 2941.25 and held that:

> Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, *a priori*, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.

Logan, *supra*, 397 N.E. 2d 1345 at 1349. Thus, when Mr. Logan accosted a female and forced her down an alley for the purpose of committing rape, he was charged *inter alia*, with kidnapping and rape. He was convicted of both counts and sentenced consecutively.

Applying R.C. § 2941.25, the Ohio Supreme Court found that the single animus possessed for the perpetration of forcible rape necessarily included the ingredients of kidnapping where the movement of the victim was no further and no longer than was present in that case. The kidnapping conviction was reversed.

No definition of the 'same offense' in the Fifth Amendment, be it *Blockburger* v. *United States*, 284 U.S. 299, or any other would encompass the kidnapping and rape described in *Logan*, *supra*.

Therefore, Ohio has specifically expanded the protections that would naturally flow to all persons in Ohio under the Double Jeopardy Clause.

Secondly, R.C. § 2941.25 is not limited in timing to either one indictment, one proceeding, or successive prosecutions. The statute, to be sure, uses the term "the" indictment, but it cannot be read so literally.

If Mr. Logan had been charged in a second indictment with kidnapping, there is no doubt that he would have still been entitled to the protection of the statute if he had previously been convicted of the rape. Nothing in the opinion of the Ohio Supreme Court suggests the contrary. Had the facts been the same as described, it was his "conduct" that activated the protection and there is no limitation in the statute that would have prevented him from asserting it in a proposed second trial after his rape conviction.[3]

This protection is significantly different from that offered by the Fifth Amendment. *Brown*, specifically forbids successive prosecutions for the "same offense," but the Ohio statutes in the *Logan* case are clearly not the same offense and successive prosecutions are not barred for different offenses.[4]

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[3] Indeed without this interpretation, prosecutors could simply nullify the holding of *State* v. *Logan*, *supra*, by never indicting these offenses together or trying them together.

[4] Even if this Court adopts the collateral estoppel portion of the Double Jeopardy Clause, a question left unanswered by *Brown*, at 166, n.6, Logan

The third difference between the Ohio statute and the federal Constitution is that the statute prohibits *convictions* themselves and is not limited to prohibiting consecutive sentences.

If the Ohio statute had merely prohibited cumulative punishment for allied offenses, it would have simply been taking the opposite tack of that taken by the Missouri legislature. Cf. *Missouri* v. *Hunter*, *supra*. But far from choosing to not authorize cumulative sentencing, Ohio has specifically chosen to not allow more than one *conviction*.

Brown, *supra*, *Whalen* v. *United States*, 445 U.S. 684, and others make it plain that the Double Jeopardy Clause does prohibit multiple convictions.

The difference is enormous because it is the conviction that gives the power to the state initially to impose sanctions and an error capable of correction on appeal might apply to only one conviction and its reversal would leave the other conviction in tact. In the *Logan* case, for example, if the rape conviction were found to have been based on insufficient evidence and reversed outright, the kidnapping, but for R.C. § 2941.25, would still stand.

Because of the preceding, it cannot be doubted that the Ohio resolution of Mr. Johnson's challenge to a future aggravated robbery prosecution is based on an "independent" state ground. The multiple counts statute has a basis far different from either the constitutional or common law foundations of the Double Jeopardy Clause.

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could not have won since the kidnapping was probably not an "ultimate" fact encompassed by the rape. On the other hand, if the Court applies the logic of *In Re Nielsen*, 131 U.S. 176, also reserved in *Brown*, Logan might have prevailed if the kidnapping were viewed as one of the "parts" of the criminal goal. But for these purposes, since that position has not been taken by this Court to date, Ohio could not be said in any way to have interpreted its own law ". . . because it felt under compulsion of federal law as enunciated by this Court so to hold, . . ." *Zacchini*, *supra*, at 568, quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5.

The test for 'independent' found in *Michigan* v. *Long*, *supra*, requires that it be "apparent from the four corners of the opinion," *Id.*, 1214, that the case is decided on state law. If the word "opinion" is treated as "syllabus," at least as far as Ohio is concerned, the state law ground and, hence, its independence, is apparent in this case. Even examining the opinion by Justice James Celebrezze, as it relates to this issue, leaves no doubt that the statute is the basis for decision. The respondent suggests, however, that with regard to syllabus one, this Court is confined to the syllabus since its meaning is not doubtful.

The decision below is also "adequate" on this point because it accomplishes its end without more. Where the state proposes prosecution of a person for what the Supreme Court of the state had held is "an allied offense of similar import" within the meaning of R.C. § 2941.25 to an offense that the same person has already been convicted of, it is clear that the proposed prosecution is impermissible. That is the holding below.

Since no additional questions need to be answered with regard to the status of the robbery-theft portion of this indictment in light of the syllabus to *Johnson*, *supra*, it is adequate to answer the question.

This Court's settled jurisprudence both before and after *Michigan* v. *Long*, *supra*, is well stated in *Zacchini:*

> If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.*, 355 U.S. 597 . . . .

Id., at 566. *Long* did not change that rule.

C. The second syllabus below is an explication of Ohio law regarding the relationship between murder and manslaughter

Without doubt, the second syllabus of the *Johnson* opinion can be read as raising doubts concerning its meaning and its foundation. Because of those doubts *Perkins* v. *Benguet Con-*

solidated Mining Co., supra, probably requires this Court to examine the signed opinion.

The syllabus rule, together with the *Perkins* and *Zacchini, supra*, determination to look at the opinion, comprise a two-part test to ascertain if the presumption adopted in *Michigan* v. *Long, supra*, comes into play.[5]

The *Long* test, as discussed here, is that this Court will assume, in the absence of direct evidence to the contrary in the opinion, that "the state court decided the case the way it did because it believed that federal law required it do so." *Michigan* v. *Long, supra*, 77 L.Ed. 2d at 1214.

In first examining the second syllabus it is apparent that two notions are expressed. First, the Court below declares:

> The offenses of murder, R.C. § 2903.02, and involuntary manslaughter, R.C. § 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental state.

Johnson, supra, syllabus two (first sentence). The import of this part of the syllabus is its establishing the relationship between two Ohio homicide statutes.

Murder is defined by Ohio law as the purposeful killing of another. ("No person shall purposely cause the death of another." R.C. § 2903.02, Pet. for Cert., p. A-26). Involuntary manslaughter is defined as causing the death of another as a proximate result of the offender's committing a misdemeanor. ("No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor." R.C. § 2903.04(B), Pet. for Cert., p. A-26).

The Court below held in the first sentence of the syllabus that these two crimes are very closely related and, as a matter of state statutory interpretation, are distinguishable *only* by the mental state of the offender. Not only is interpreting state

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[5] *Long* was decided just less than two months before *Johnson*, i.e. July 6, 1983 and August 31, 1983.

statutes the proper role for a state court, under *Garner* v. *Louisiana*, 368 U.S. 157, 169, (cited with approval in *Brown* v. *Ohio*, *supra*, at 167), the Ohio courts "have the final authority to interpret . . . that state's legislation."

That "final authority" draws these two offenses much more closely together than urged by the petitioner (Brief of Petitioner, pp. 33-38), but more importantly does not create the uncertainty necessary to go beyond the syllabus. *Perkins* v. *Benguet Consolidated Mining Co.*, *supra*.

> The second sentence of syllabus two provides:
>
> The prohibition against double jeopardy requires that in any one killing, the offender may be convicted of one or the other of the offenses but not both.

It cannot be seriously argued, and the respondent does not do so, that this sentence does not implicate the presumption of *Michigan* v. *Long*, *supra*. At the same time it is ambiguous enough to require reference to the signed opinion accompanying the syllabi. *Zacchini*, *supra*.

In the opinion there is much discussion and reference to the Fifth Amendment and cases of this Court. At the same time, there is discussion of Ohio statute law (R.C. § 2941.25) and Ohio cases. However, this decision is far different from *Zacchini* v. *Scripps-Howard*, *supra*, where the Ohio court identified a media privilege from suit in a syllabus that made no direct reference (or even indirect) to state law and this Court, in examining the signed opinion, clearly identified the foundation of the Ohio court's syllabus to be its understanding of the federal Constitution.

The opinion below restates the protections of *North Carolina* v. *Pearce*, 395 U.S. 711, but in the context of the opinion it appears to be as much historical as anything else being followed by a summary of the State's argument.

The Ohio court also quotes *Blockburger* v. *United States*, 284 U.S. 299, but that is not evidence of its reliance on federal constitutional law since the *Blockburger* rule is not a con-

stitutional requirement but a rule of federal statutory construction. *Albernaz* v. *United States*, 450 U.S. 333; *Missouri* v. *Hunter*, *supra*, (dissenting opinion of Justice Marshall, 74 L.Ed. 2d 535 at 547.) As the dissent below points out, the Ohio Supreme Court had just recently concluded that *Blockburger* had limited utility in Ohio and was not to be understood to serve any function beyond divining legislative intent. *State* v. *Moss*, 69 Ohio St. 2d 515.

Beyond these references, the opinion below does not lead inexorably to the conclusion that the syllabus regarding the homicide is based on federal law.

On the contrary, the dispositive paragraph of the opinion, (second from the end), is based directly on Ohio statutory law and interpretation. When the author of the opinion writes:

> It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one.

he is interpreting and applying state law. No decision of this Court commands, or even suggests, that two state homicide statutes are mutually exclusive from one another.[6]

When the Court below writes that 'where there is but one victim, the accused may be found guilty of either murder or involuntary manslaughter but certainly not both', *Johnson*, at 424, it is doing one of two things; either it is misstating federal constitutional law *(e.g. Missouri* v. *Hunter, supra)* or it is applying and enforcing the law of the state. If such statement follows a pronouncement that murder and manslaughter, under Ohio law, differ only by the mental state of the actor, it cannot be doubted that it is applying and enforcing *state* law.

While the opinion has gratuitous references to the federal Constitution and decisions of this Court, careful examination

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[6] Conceivably two homicide prosecutions in the same trial might implicate constitutional principles if a person were convicted of one and acquitted of the other. Cf. *Green* v. *United States*, 355 U.S. 184.

reveals that none is the basis for the decision. This conclusion is buttressed by the first syllabus, discussed above, which directly refers to the state statute. It would make no sense for the Ohio court to decide these two identical questions on different grounds and this Court should not assume that it did.[7]

Justice White in *Zacchini* v. *Scripps-Howard*, *supra*, restated the role of this Court on this issue:

> [O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Zacchini, at 566 quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. *Michigan* v. *Long*, *supra*, did not enlarge the power of this Court over state judgments and its presumptions should not be applied mechanically to usurp state authority. The 'evil' that this jurisdictional limitation is designed to guard against is present in this case, to wit: advisory opinions.

D. Regardless of this Court's decision on federal law, the Ohio Court, on remand, would be free to adhere to its former judgment based on R.C. § 2941.25

If the robbery dismissal is held to be based on an independent state ground and the murder dismissal is held to be based on federal law, either sustantively or under *Michigan* v. *Long*, the writ must nevertheless be dismissed because the Ohio court on remand could still dismiss the murder count under R.C. § 2941.25 making this Court's decision advisory only.

Regardless of the uncertainty that may surround the Ohio court's disposition of the murder charge (the respondent does not concede that it is intolerably uncertain), its disposition of the robbery charge could not more squarely meet the requirements of *Michigan* v. *Long*, *supra*, as an assertion and explica-

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[7] The single indictment and the entry of the pleas were one event. (Jt. App. pp. 2-9). No analysis would allow them to be treated as different legal questions or invoke different protections.

tion of its state law foundation. For that reason at least *part* of the judgment rests on unreviewable state grounds.

Assuming, without conceding, that this Court can 'divide' the judgment of a state court for jurisdictional purposes, the writ must still be dismissed under the holdings of *Herb* v. *Pitcairn, supra,* and *Zacchini* v. *Scripps-Howard, supra,* because

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court *after we corrected its views of federal laws,* our review could amount to nothing more than an advisory opinion. (Emphasis added.)

Herb v. *Pitcairn, supra,* at 125-6.

There is language in the opinion below that must be taken as improperly applying federal law.[8] It seems clear that whatever is the final resolution of this case, the multiple punishment prong of *North Carolina* v. *Pearce,* 395 U.S. 711, is not implicated. (Brief of the United States, p. 11.)

That apparent misstatement in the opinion, as opposed to the syllabus, cf. *Perkins* v. *Benguet Consolidated Mining Co., supra,* must be viewed with the understanding that "This Court . . . reviews judgments, not statements in opinions." *FCC* v. *Pacifica Foundation,* 438 U.S. 726 at 734, quoting *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297.

If this Court "corrected" the state court's view of federal law by saying either that there is no application of the Double Jeopardy Clause in this case, or, that it is the second prong of *Pearce, supra,* (protecting against a second prosecution after conviction) that applies, the Ohio Supreme Court would be free on remand to adhere to its former *judgment,* as opposed to opinion, on the basis of Revised Code Section 2941.25, the multiple count statute.

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[8] "Rather, the case concerns the third double jeopardy protection prohibiting multiple punishments for the same offense." *State* v. *Johnson,* 6 Ohio St. 3d 420 at 421.

That would be the case in one of two ways: Either the Ohio court could say that it had decided this portion of the case on the statute originally despite language conceivably making that unclear, or, it could say that 'the decision of the Supreme Court of the United States regarding our earlier application of the Double Jeopardy Clause notwithstanding, we now conclude that the murder charge was properly dismissed because Mr. Johnson has previously been convicted of manslaughter which is an "allied offense of similar import," (R.C. § 2941.25 applied.)'

Such an option remaining in the Court below presents a very significant risk that any decision of this Court will be advisory only and will not finally adjudicate a "case or controversy."

II. The Double Jeopardy Clause Of The United States Constitution Prohibits Trial Of The Respondent On The Charges Of Murder And Aggravated Robbery

Kenneth Johnson has been convicted of killing Thomas Hill and of stealing his property.

He is presently three and one-half years into the sentence of imprisonment at the Chillicothe Correctional Facility, that the petitioner has imposed upon him for his conduct. He is there today.

The petitioner proposes taking Mr. Johnson from Chillicothe to Lake County and putting him on trial for killing Thomas Hill and stealing his property.

The above recitation is certainly not made flippantly or disrespectfully but only to attempt to bring some simplicity to the question presented by this case. Few of the cases in this Court's burgeoning double jeopardy jurisprudence have had less complicated facts and more straightforward choices.

Having been convicted of the crimes described, the unaltered historical protections of the Double Jeopardy Clause would surely be thought to protect him from being prosecuted for them again unless, for some reason, the planned prosecu-

tion is not for the "same offense" or it is not viewed as placing him "twice" in jeopardy. It is manifestly clear that the two dismissed charges are the "same offense" and a trial now would again put the respondent in jeopardy of losing his liberty for a greater period of time for the same offenses for which he has been convicted.

A. Murder and involuntary manslaughter are the "same offense" for double jeopardy purposes.

Since, the constitutional language itself includes "same offense," the determination of whether two state crimes are the same offense is, in the final analysis, a question of federal constitutional law for this Court. At the same time, this Court has declared that a greater and lesser included offense under state law will invariably be the "same offense" for purposes of the Fifth Amendment. "The greater offense is therefore the "same" for purposes of double jeopardy as any lesser offense included in it." *Brown* v. *Ohio*, 432 U.S. 161 at 168.

The state courts, being the final arbiters of their own state's legislation, *Garner* v. *Louisiana*, 368 U.S. 157, 169, will typically be the place to look for (1) the general test in that state regarding lesser included offenses and (2) whether the two crimes in question have been determined by the state court to bear that relationship to one another.

Because of *Brown*, if the state has made that determination it has also circumscribed this Court's authority to conclude that the two offenses are *not* the same for double jeopardy purposes.

In this case the Ohio Supreme Court has specifically held that involuntary manslaughter is a lesser included offense of murder because it has determined in the syllabus that the two share the common element of 'causing the death of another' and are 'distinguishable only by the offender's mental state.' The Court also points out at the end of the opinion: "Involuntary

manslaughter involves a *lesser* mental state . . ." (Emphasis added, *Johnson* at 424).[9]

This Court observed in *Illinois* v. *Vitale*, 447 U.S. 410, (a case with more than a few similarities to this case):

> We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here.

Id., at 416. Applying that maxim to the opinion (and syllabus) below, the conclusion is unavoidable that the only different element in these two crimes is the mental state of the offender and that whatever the mental state required by the felony or misdemeanor that is the predicate for the manslaughter, it will be included in the "purposely" required to prove murder, the greater offense.[10]

In addition to specifically identifying manslaughter as a lesser included offense of murder (see, also, *State* v. *Scott*, 61 Ohio St. 2d 155), the generally announced guidelines for what constitutes a lesser included offense are satisfied here.

In *State* v. *Wilkins*, 64 Ohio St. 2d 382, the Ohio Supreme Court held that one offense is a lesser included of another if all three of the following tests were met:

(1) One offense must be lesser in degree than the other,

(2) The offense of the greater degree cannot be committed without the lesser offense also being committed, and

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[9] Ohio Revised Code Section 2901.22(E) makes it clear that any particular culpable mental state, *e.g.* purposely, also includes any and all the lesser culpable mental states, *e.g.* knowingly, recklessly, negligently, etc.

[10] The Ohio court makes this determination regardless of whether the underlying crime is identified or not. The petitioner's argument that some misdemeanors, like discharging firearms in the city, may require no mental state (Brief of Petitioner, pp. 34-38), misses the point. Firstly, it would be impossible to intentionally shoot someone in Mentor-on-the-Lake without being guilty of discharging a firearm in the City. Secondly, the Ohio Supreme Court's determination regarding the relationship between these statutes is conclusive and is not a part of this appeal.

(3) Some element of the greater is not required to prove the commission of the lesser.

Applying these tests here, murder is surely a 'higher' crime; one cannot commit murder without committing a host of lesser offenses, (felonious assault, assault, menacing, or discharging a firearm in the city); and, obviously, none of the lesser offenses will include the element of purpose to kill as does murder.

The Ohio Supreme Court did not hold that murder subsumes every misdemeanor on the book; it did hold that murder subsumes every misdemeanor capable of being the proximate cause of someone's death. Ergo, "the offenses of murder, R.C. § 2903.02, and involuntary manslaughter, R.C. § 2903.04, share the common element of causing the death of another and are distinguishable *only* by the offender's mental state." *State* v. *Johnson*, 6 Ohio St. 3d 420, syllabus two. (Emphasis added.)

The Ohio determination of what is required to prove each of these crimes establishes that manslaughter is a lesser offense and, therefore, the application of the constitutional rule of *Brown*, *supra*, regarding what constitutes the same offense, is controlling.

While greater and lesser included offenses are the "same" under the Fifth Amendment, and that is enough to decide this case, that test alone is not the final outline of the Fifth Amendment protection. Greater and lesser included offenses implicate the ever-present Blockburger Rule, *Blockburger* v. *United States*, 284 U.S. 299 and multiple-part crimes implicate *In Re Nielsen*, 131 U.S. 176 and its progeny.

The Blockburger Rule (which does not need repeating) by now is thoroughly understood to be a rule of federal statutory construction, *Whalen* v. *United States*, 445 U.S. 684, applicable in the first instance to the third prong of the test contained in *North Carolina* v. *Pearce*, 395 U.S. 711, 717, to determine, in the face of congressional ambiguity, whether successive punishments are authorized for two separate convictions.

While that was the original purpose of the Rule, it has since done tremendous service as the *initial* test to determine if two

crimes are the "same offense." In this role, *Blockburger* has not specifically been held to be a constitutional test for determining whether two crimes are the same, but its widespread use for that purpose in both federal and state cases confirms that its utility is not different from a constitutional test. *Missouri* v. *Hunter*, *supra*, (dissenting opinion).

It was the application of *Blockburger* to greater and lesser included offenses in *Brown* v. *Ohio*, *supra*, that resulted in the holding of that case (quoted above) that they would invariably be the "same offense" for double jeopardy purposes.

But it is true that *Blockburger* focuses on elements of crimes and the evidence that is required to prove them. In cases where the original purpose of the rule, (determining if cumulative punishment is allowed) is being utilized, it is very effective and sensible.

Thus, where the question is whether there are two offenses or only one, there will already have been two charges and two convictions and the court can then examine the two charges to determine if each required proof of a fact that the other did not. *Albernaz* v. *United States*, 450 U.S. 333, *Gore* v. *United Staes*, 357 U.S. 386.

The use of *Blockburger* for other portions of the *Pearce* test is more difficult and in some cases, like this one, is impossible. In this case and in *Illinois* v. *Vitale*, *supra*, it was never known what the full charge would be, at least in terms of the elements of the crimes.[11] In *Vitale*, the prosecution consistently maintained that 'failure to slow' was not the only act of the juvenile that could establish the traffic manslaughter, but never identified what act it was that it intended to rely on.

Here, as noted in fn 11, the prosecutor has likewise not identified the misdemeanor involved and almost suggests that he does not know himself.[12]

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[11] Petitioner admits in this Court that "It has never been established which underlying misdemeanor was the cause of death." Brief of Petitioner, p. 34.

[12] Perhaps one of the grand jurors will remember.

In these situations this Court has recognized that the same-required-evidence test of *Blockburger* is ineffective and an examination of *actual* evidence to be used at the second trial is required. *Vitale, supra*, at 419, 420. Also, *United States* v. *Allen*, 539 F. Supp. 296, 310, (C.D. California).

The "actual" evidence test of *Vitale*, as opposed to the "required" evidence test of *Blockburger* was described as follows:

> In any event, it may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such a failure; it may concede as much prior to trial. In that case because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma, 433 U.S. 682.

Id., at 420.

This "actual" evidence test is a restatement of *Nielsen*, *supra*, and has been regularly reaffirmed.

Mr. Johnson has 'already been convicted for conduct that is a necessary element' of the more serious charge, to wit: causing the death of Thomas Hill. And, 'the State may find it necessary to prove manslaughter or rely on conduct, i.e. shooting the gun, necessarily involving manslaughter.' For these reasons murder and manslaughter are the same offense for purposes of the Double Jeopardy Clause.

The "same offense" will never be the exact same offense because no prosecutor after he had tried and convicted a person of one whole indictment would begin the prosecution again.[13] Likewise no prosecutor would be able to ignore an

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[13] Actually something close to that could happen here. Under *State* v. *Scott*, *supra*, Johnson would be entitled to jury instructions on misdemeanor manslaughter if he went to trial. He could in that event be convicted of precisely the same offense which would surely violate the Fifth Amendment. Of course it would be too late for him to do anything about it. The position of the United States on this question is seriously wide of the mark. Brief of

acquittal and re-indict the defendant again for the same crime. (While it may have happened, it would have been short-lived.)

The "same offense" questions will always involve slightly different crimes and will arise uniformly where the prosecutor has lost a case and wants to recoup the loss or when he has gotten some conviction but is dissatisfied with the punishment.

The Double Jeopardy Clause must not be narrowly applied on the understanding of what is the same offense.

Accordingly, the proposed prosecution of Kenneth Johnson for murder will be for the "same offense" for which he has already been in jeopardy.[14]

B. The collateral estoppel ingredient of the Double Jeopardy Clause prohibits further prosecution of the respondent.

Ashe v. *Swenson*, 397 U.S. 436, determined that the ancient legal doctrine of collateral estoppel was an integral part of ". . . the Fifth Amendment guarantee against double jeopardy." *Ashe*, at 445. Justice Stewart, writing for himself and six other Members of the Court, defined it as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id., at 443.

United States, pp. 21-22. What the amicus does not answer is why the respondent should withdraw his plea(s) in order for the State to avoid the double jeopardy problems that will remain in this case if there is a trial. *Jeffers* v. *United States*, 432 U.S. 137, 151 n.17. *Illinois* v. *Vitale*, *supra*, at 420.

[14] In the first two "Questions Presented" the petitioner makes references to the whole indictment which includes the aggravated robbery and theft. No special reference is made to these charges in the argument and it appears to be conceded that they are the "same offense".

The practical tests of *Ashe* are: (1) a determination (one way or the other) of an ultimate fact in dispute, (2) a final judgment reflecting it, and, (3) an identity of parties. The Court also noted that the applicability of tests to a particular case was "a matter of constitutional fact [it] must decide through an examination of the entire record." *Id.* 442-3.

The application of these tests do this case is straightforward. There is an extant judgment, unappealed by anyone, between the State of Ohio and Kenneth Johnson convicting and sentencing him for the involuntary manslaughter of Thomas Hill and the theft of his property. Jt. App., p. 20.

With regard to the involuntary manslaughter that judgment constitutes a final, legal determination of the ultimate fact in this controversy, the causing of Mr. Hill's death. That judgment says: 'Kenneth Johnson caused the death of Thomas Hill as a proximate result of the said Kenneth M. Johnson's committing or attempting to commit a misdemeanor.' Jt. App., p. 2, Count Two of the indictment.

Since the murder count alleges that the respondent "purposely" caused the death of Thomas Hill, it is obvious that the 'ultimate' question between them is: How was the death caused? It is just as obvious now that the ultimate fact has been "determined" and that determination is that the death was caused as a proximate result of Mr. Johnson committing a misdemeanor.

In *Ashe* the only conceivable question from an examination of the entire record was whether Ashe was one of the robbers. Here, just as in *Ashe*, the only conceivable question was the manner in which the death was caused.

Since the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United States*, 332 U.S. 575, 579, it can make no constitutional difference that this judgment was the result of a guilty plea rather than a verdict. In fact when the judgment follows a guilty plea, questions about what the jury may

have based their verdict on are eliminated together with the attendant risk of error.

Likewise there is nothing at all in the history of collateral estoppel to suggest that it *only* applies to acquittals. The very language of Justice Stewart in *Ashe* refers only to judgments without any hint that it is meant to apply only to judgments of acquittal.

And while the principle of collateral estoppel has only recently (1970) been incorporated into the Fifth Amendment, it was fully contemplated by Blackstone as an adjunct to the plea autrefoits convict. He noted in *Book IV* of *Commentaries*, at pp. 335-6:[15]

> And this depends upon the same principle as the former [autrefoits acquit], that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; *for the fact prosecuted is the same in both*, thought the offences differ in coloring and in degree. (Emphasis supplied.)

This Court, in *Brown* v. *Ohio*, supra, fn 6, specifically left open the question of whether Brown would be entitled to the "additional protection of Ashe and Nielsen" to protect him against repetition of proof in successive prosecutions. Since Brown pleaded guilty to both charges in his case, it can hardly be claimed that *Ashe* is somehow limited to acquittals. Cf. *Illinois* v. *Vitale*, 447 U.S. at 420.

The other crucial consideration of *Ashe* is the prohibition against relitigating an ultimate fact in a "future" lawsuit. Is the reproving of ultimate facts following a guilty plea and judgment a "future" lawsuit when the four charges initially appeared in one indictment? The answer is an emphatic "yes."

The history of collateral estoppel in civil law and its philosophical foundation indicate strongly that its major goal is the

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attainment of finality in judgments and the settlement of disputes. Without such a doctrine in civil law every litigant failing to prevail in, say, a negligence case could continue to seek hearings striving for more desirable results.

The Double Jeopardy Clause, on the other hand, while not unconcerned with finality, *Crist* v. *Bretz*, 437 U.S. 28, 33, has as its foundation protection against government oppression.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .

Green v. *United States*, 355 U.S. 184, 187-8.

Since the judgment against the respondent remains, it can make no difference that the proposed prosecution originates in the same indictment. It was the state that had full control over the indictment and the respondent's plea of guilty at his very first opportunity, under Ohio Rules that fully authorized him to do so, cannot be held to deprive him of the protection of the Fifth Amendment.

If a better rule would be that the government's objection to the plea is sufficient to prevent its acceptance, that is a matter for the Ohio General Assembly and the Ohio Supreme Court; it is manifestly not an acceptable reason to alter the protections of the Double Jeopardy Clause.

There is nothing in the phrase 'future lawsuit' that limits its application to a proceeding started later with a separate document, be it a civil complaint or a new indictment. It is undisputed that respondent could not have been charged in a second indictment with murder and aggravated robbery following his conviction for manslaughter and theft in an earlier indictment. *Brown* v. *Ohio*, *supra*. His protection against having the same facts litigated twice cannot be so fragile that it will apply if the indictments are separate and it will not apply if there is only

one. To allow reproving these facts now because it is not a "future" lawsuit would be defining the protection of *Ashe* in a "hypertechnical and archaic approach of a 19th century pleading book." *Ashe* at 444.

C. A trial now on murder and aggravated robbery would put the respondent "twice" in jeopardy

A person serving a prison sentence for an offense cannot reasonably be said to not have been "in jeopardy of life or limb." As the Solicitor General rightly points out (Brief of United States at p. 12), this Court has never specifically considered the question of whether a guilty plea is the same as a jury verdict as a vehicle for establishing jeopardy, at least as a predicate for a claim that a future proposed prosecution would be double jeopardy.

Of course jeopardy can never be limited to risk of another trial; it can only mean exposure to the government's power to impose a sanction. It would seem to divert attention from the real question to argue that proper application of the Fifth Amendment will be somehow frustrated in a case such a this where there will be *no* trials.

On the basis of *In Re Hans Nielsen*, 131 U.S. 176, this Court held in *North Carolina* v. *Pearce*, 395 U.S. 711 at 717 that the Double Jeopardy Clause protects against a "second prosecution for the same offense after conviction[.]." But that phrase cannot be read as prohibiting only a 'second, independently originated prosecution'. Indeed all parties here concede that had Mr. Johnson been indicted for manslaughter and theft and pleaded guilty, he could not have then been indicted and tried for murder and aggravated robbery without violating the Fifth Amendment.

If the above language were to mean that it is only a second, new prosecution that is prohibited then the Double Jeopardy Clause would be effectively a grant of authority for the government and not the repository of protections *from* the government that it was designed to be. It would give "conviction" an

artificial and mythical meaning and would be license for prosecutors to avoid the commands of *Pearce*, *supra*.

Since jeopardy has attached, future proceedings must violate the constitutional protection unless it can somehow be said that they are a "continuation" of the original proceeding (which was 3½ years ago).

Cases, relied on heavily by the petitioner and the United States, which delineated exceptions to the rule against a second proceeding are significantly different than this case and do not compel the result sought.

In *United States* v. *Scott*, 437 U.S. 82, this Court held that a government appeal from a motion that dismissed the indictment for a speedy trial violation was authorized by statute because a re-trial was not barred by the Fifth Amendment. This was held to be so even though the trial court had not dismissed the indictment until the end of the first jury trial.

Despite the fact that Scott had been in "jeopardy" at the first trial, a second trial (if the government won the appeal) was permissible because the dismissal was unrelated to guilt or innocence and was as the result of the defendant's own motion. From these facts the Court concluded that the Fifth Amendment "does not relieve a defendant from the consequences of his voluntary choice." *Scott*, at 99.

Reliance on that quotation to make an analogy to Johnson's plea of guilty overlooks a significant condition that is an integral part of the *Scott* opinion.

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis *unrelated to factual guilt or innocence* of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause . . . (Emphasis added.)

Ibid.

Johnson, unlike Scott, sought termination *because of*, and *after*, a determination of his guilt. This Court's concern in *Scott*

regarding the extension of the right against double jeopardy draws a very important line between guilt-not-guilt determinations and exposure to the rigors of trial that do reach that result.

Scott, while it eschews waiver as a rationale, stands simply for the rule that a defendant who seeks and obtains a mid-trial dismissal, other than on guilt or non-guilt, risks the possibility that the ruling will be reversed on appeal. *Scott*, at 100 n.13. Johnson's situation is significantly different; the determination of his guilt by the valid guilty plea ended the controversy. Perhaps more importantly, Johnson filed no motion or took any action to forstall a judicial inquiry into the events of January 25, 1979. His fully authorized plea of guilty cannot be equated with a motion to terminate the proceedings.

The fact that this Court authorized what in fact, if not in law, was a two step process in the Maryland Juvenile Court system further identified the core interests that the Double Jeopardy Clause guards. *Swisher* v. *Brady*, 438 U.S. 204.

In *Swisher, supra*, the fact that evidence might be repeated in the *de novo* hearing before the juvenile judge was held not to activate the protection for the basic reason that the original hearing was before a master (referee) who was wholly without jurisdiction to enter a final judgment. *Swisher*, at 208-9.

Hence, the possibility in Maryland that some juveniles may have to "endure" a second hearing at which evidence is adduced,[16] was acceptable because at the first hearing the officer was not capable of entering judgment.

While the defendants in *Scott* and *Swisher* might have endured the evidence twice, in neither was the risk of conviction extant or oppressively manipulated. In *Scott* the risk of conviction was clearly present until the defendant was able to termi-

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[16] Under the Maryland law discussed in *Swisher*, the juvenile himself would have to agree to the judge hearing new evidence.

nate it on an issue unrelated to his guilt or innocence. In *Swisher*, it simply was not present during the taking-of-evidence stage of the proceeding.

On the other hand, this Court has unanimously held that a two-step process that includes the risk of conviction at each level is prohibited by the Double Jeopardy Clause. Thus, in *Breed* v. *Jones*, 421 U.S. 514, the California Juvenile Code provided that in the case of certain offenders the juvenile court could, following the adjudicatory stage, find the juvenile not amenable to treatment as a juvenile and transfer the case to the adult court.

After hearing testimony on the facts, including from the juvenile, the juvenile court found that the facts alleged were true.[17] That hearing constituted an adjudication on the merits. Pursuant to California law the case was transferred to adult court and the juvenile was again convicted of the crime and placed in custody.

Not only did this Court find that such a system offended the policies of the Fifth Amendment by subjecting the defendant to two trials for the same offense, *Breed*, at 534, it rejected the argument that somehow this two-stage trial could be justified as a "continuing" jeopardy.

The difference with *Swisher*, *supra*, is plain: even though there were two evidence-taking hearings, which would be burdensome, in *Breed*, supra, the juvenile judge had complete statutory authority to find the juvenile guilty.

One argument of the State in *Breed*, *supra*, was that the jeopardy should be properly viewed as continuing so as to fully encompass the "dispute" between the State and the juvenile. The State attempted to analogize its argument to the sometimes expressed rationale applied to a re-trial following an appellate reversal.

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[17] The crime charged was robbery.

The court found no justification in such an analysis and rejected it.

> Similarly, the fact that the proceedings against respondent had not "run their full course" *Price* v. *Georgia*, *supra*, at 326, within the contemplation of the California Welfare and Institutions Code, at the time of the transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial.

Breed, *supra*, at 534.

The instant case is even more within that concept because there are no state proceedings that have not run their course. Far from the statutory transfer procedure that was in effect in California, here we have only the interest of a prosecutor to go to trial. If the statutory interest was insufficient in *Breed*, to avoid the Fifth Amendment, it would follow that this prosecutor's interest must be likewise.

Of course, this case is even more poignant than *Breed*, *supra*, since there is fully executed judgment on the first proceeding. The respondent's interest in the finality of that conviction is great and no interest of the State surpasses it.

This Court has frequently written that the "exaltation of form over substance is to be avoided." *United States* v. *Di Francesco*, 449 U.S. 117, 142. While the "form" of this indictment might make it one proceeding, the unalterable "substantive" fact remains, as far as Kenneth Johnson is concerned, that a trial now on murder and robbery charges is a *second* proceeding.

The admonition against technical and begrudging application of the protection afforded by the Double Jeopardy Clause is well heeded when considering *Jeffers* v. *United States*, 432 U.S. 137, a case relied on extensively by the petitioner.

The reliance placed on *Jeffers* by both the petitioner and amicus is misplaced for technical as well as substantive reasons. *Jeffers* is not controlling because it is a plurality

opinion and the concurrence is based on wholly different grounds that do not implicate the Fifth Amendment at all.

Jeffers' inapplicability to this case on substantive grounds (as opposed to technical) is demonstrated by at least two major differences in the procedure that was followed.

Jeffers was indicted in two separate indictments for drug offenses. One of the offenses was arguably a lesser included offense of the other. The government sought to have the indictments tried together and the defendants opposed the motion which was ultimately denied by the District Court.

Jeffers joined in the opposition to the motion for trial together but took no other action to seek a separate trial. He was convicted of the lesser offense at the first trial and then filed a motion to dismiss the remaining indictment on double jeopardy grounds.[18]

In *Johnson*, the manslaughter and theft counts are lesser included offenses of the murder and aggravated robbery counts, respectively. That fact was discernible from the face of the indictment. On the other hand, in *Jeffers*, even after the decision, it has not been definitively concluded that §§ 846 and 848 bore that relationship to each other. *Jeffers*, at 149-150.

Because of that arguable difference between the federal statutes, the need for two indictments is at least plausible. Where the counts in this case are unquestionably lesser included offenses, the State had no need to indict them separately.[19]

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[18] This is obviously a highly shortened version of what transpired.

[19] The State apparently indicted for the lesser offenses in anticipation of Johnson claiming self-defense. Jt. App. p. 11. Under the State's theory Johnson's claim of self-defense would have prevented *it* from seeking jury instructions on the lesser included offenses, to wit: manslaughter and theft. What the State's theory does not explain is how Johnson's 'self-defense' could entitle him to a not-guilty verdict on the murder (which is a condition precedent to the jury's ever considering the manslaughter charge in Count Two), but not entitle him to a not-guilty verdict on the whole event. If his

A second difference that makes the *Jeffers* plurality opinion inapposite is the fact that Jeffers chose to go to trial and then opposed a trial together with the other indictment.

Johnson pleaded guilty and never attempted to bifurcate two cases in which the issues were joined and trials pending. The necessity for a trial never arises in any case until a defendant has denied the indictment. From this simple observation it is logically indisputable that a plea of guilty cannot be treated as a vehicle for obtaining separate trials.

Jeffers' double jeopardy challenge was rejected in the plurality opinion with some emphasis on his (1) failure to alert the Court and prosecutor that a double jeopardy claim may be ripening if the two cases were not tried together and, (2) his overt oppositon to the motion for trial together was construed as his "election" to have separate trials.

The plurality saw Jeffers' "conduct" as an exception to the rule of *Brown* v. *Ohio*, *supra*.

> If the defendant expressly asks for separate trials on the greater and lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown rule emerges.

Jeffers, at 152 (plurality opinion.)

However, this rationale cannot apply to Johnson and even the plurality in *Jeffers* seemed to say as much. In footnote 15 of *Jeffers*' plurality opinion (at 150), Justice Blackmun wrote that

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'self-defense' was not persuasive, Johnson would have been convicted of murder; if it was persuasive, he would have been acquitted of both. Likewise, the State's reason for indicting for the lesser offenses makes no sense with regard to the aggravated robbery and theft. It would take great imagination to suggest that an aggravated robbery was committed in self-defense.

the exception fashioned for application to Jeffers' fact setting might well not apply in others.

> . . . Unless it is plain that two offenses are "the same" for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option. This assumption would only be reinforced if the defendant affirmatively asked the court to require two proceedings, and in connection with his request he actively sought postponement of his second trial, as Jeffers did.
>
> . . ., he was simply under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue.

Id., at 150, n 15.

Plainly whatever uncertainty may have existed between the federal statutes at issue in that case, there was none in this case. As the transcript of the hearing of November 26, 1980 makes clear (Jt. App. pp. 10-11), the State assumed that manslaughter and theft were lesser included offenses. And, as noted earlier, the indictment was not drawn in the fashion that it was because of any apprehension on the State's part that these two offenses were not the "same" for double jeopardy purposes. (fn 19, *supra*, Jt. App. p. 11.)

With regard to the duty of the defendant to "alert" the court and the prosecution to the presence or possibility of the double jeopardy issue, the transcript of the original arraignment makes it crystal clear that everyone in the courtroom was aware within the first five minutes what position the defendant intended to take. (Jt. App. pp. 4-7.) More importantly, no action on the offered plea of guilty was taken at that hearing and the judge indicated he would consider whatever law the parties might present. (Jt. App. pp. 9-10.)

When the arraignment is on October 9, 1980, and the pleas are not finally accepted until November 26, 1980, it cannot be seriously maintained that the defendant 'lay-in-wait' for the prosecutor and then sprung the trap. The prosecutor could

have eliminated all the problems that did, or could, arise by simply dismissing the manslaughter and theft counts either at the arraignment or in the six weeks that intervened between the two court proceedings. The 'exception' to the rule of *Brown* v. *Ohio*, *supra*, cannot be applied to these facts.

The great service rendered by the Double Jeopardy Clause for 193 years compels the conclusion that its protection applies to Kenneth Johnson.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted, the decision below resting on adequate, independent state grounds.

In the event that jurisdiction is found to rest here, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

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No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

VS.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

ARGUMENT IN RESPONSE TO BRIEF OF RESPONDENT

ARGUMENT

I. The United States Supreme Court Looks to the Opinion of the State Court Decision in a "Syllabi" State in Order to Resolve Whether a Substantial Federal Question Had Been Passed Upon in the State Court, and the State Court Judgment Will Be Reviewed by This Court Where the Adequacy and Independence of Any Possible State Law Ground Is Not Clear From the Face of the Opinion.

This Court recognizes that although the syllabus constitutes the official opinion of the Supreme Court of Ohio, the syllabus must be read in light of the facts and issues of the case especially where the author of the opinion

erroneously rests his decision on compulsion by federal law.

Where the syllabus of the Ohio Supreme Court standing alone might have meant that the decision rested solely upon state law, and where the syllabus was accompanied by an opinion which erroneously placed the concurrence of its author upon compulsion by federal law, and where the report of the case did not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion, this Court held: First, that the opinion was an official part of the report of the case; Second, although the Ohio law recognized that the syllabus constituted the official opinion of the Court the law still required that the syllabus be read in the light of the facts and issues of the case; and Third, that the judgment would not be allowed to stand where the opinion accompanying the syllabus erroneously placed the concurrence of its author upon compulsion by Federal Law. *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952).

The Ohio Supreme Court opinion relies on a misapplication of the Double Jeopardy Clause and federal precedents interpreting its application. As in *Perkins*, at 443, "[T]o allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the Court below had felt free, under our decisions, to do so."

The first syllabus applies Ohio Revised Code Section 2941.25(A) to the aggravated robbery and theft offenses. The court interprets the Double Jeopardy Clause and the applicable federal precedent in its determination of the two aforementioned offenses as offenses of similar import. It is expressly stated by the court that the multiple count

statute, Ohio Revised Code Section 2941.25, is no more than an attempt to "effectuate" the principles contained in the Double Jeopardy Clause, *State v. Johnson*, 6 Ohio St. 3d 420, at 422 (1983); citing, *State v. Thomas*, 61 Ohio St. 2d 254, at 259, 260 (1980). Nowhere does the court determine that the legislature has opted for a more restrictive approach to the issue of multiple crimes, as Respondent asserts at page 8 of his brief. The Court, in effect, applied the Double Jeopardy Clause and its interpretative federal precedents because Ohio Revised Code Section 2941.25 is the statutory embodiment of the federal law.

Respondent has attempted to create a distinction between the multiple count statute and the Double Jeopardy Clause as interpreted by federal law. The notion that Ohio has opted for a more restrictive approach to the issue of multiple crimes in no way reflects the decisions of the Supreme Court of Ohio.

Ohio Courts have expressly recognized the allied offense statute as a "sentencing vehicle". *State v. Kent*, 68 Ohio App. 2d 151, at 154 (1980). Where a defendant pled guilty to Rape and to Kidnapping and the Court accepted the guilty pleas to both counts, the defendant argued that the trial court erred in entering conviction and judgment for both Rape and Kidnapping because Rape and Kidnapping were offenses of similar import subject to the limitations of Ohio Revised Code Section 2941.25(A). *State v. Kent*.

Citing *State v. Osborne*, 49 Ohio St. 2d 135, 144 (1976), vacated on other grounds 438 U.S. 911 (1978), the *Kent* Court held:

> "[t]he allied offense statute does not mean that persons cannot be either indicted, tried, or found guilty of

multiple offenses, even where they were classified as allied offenses.

The allied offense statute merely provides that where allied offenses are present, the person can only be convicted of one of the offenses. *Conviction in this contest means a judgment of conviction.*

A judgment of conviction has been defined as a plea or verdict of guilty and the sentence imposed. Ohio Rule of Criminal Procedure 32(B); *State v. Henderson* 58 Ohio St. 2d 171 (1979). Thus, the sentence imposed completes the judgment of conviction. When we speak of the allied offense doctrine, we are speaking of offenses for which an individual may be sentenced. *In reality, the allied offense statute is a sentencing vehicle." State v. Kent,* 68 Ohio App. 2d 151 at 154 (1980). (Emphasis added.)

Respondent would have this Court believe that the allied offense statute in Ohio prohibits convictions on allied offenses unlike the Double Jeopardy Clause which does not prohibit multiple convictions but goes only to sentencing. Clearly, Ohio Courts have determined that the allied offense statute is a sentencing vehicle, a view which is consistent with the Double Jeopardy Clause and its interpretative federal case law.

The Supreme Court of Ohio not only recognizes the allied offense statute as the statutory embodiment of the Double Jeopardy Clause, it has expressly stated that Ohio Revised Code Section 2941.25 does not prevent a defendant from being convicted on all counts of a multiple count indictment. *State v. Osborne,* 49 Ohio St. 2d at 144.

In *Osborne,* the prosecution was justified in submitting both premeditated murder and felony murder counts to the jury. The only prohibition imposed by the

allied offense statute was against sentencing on both counts if they were found by the court to be allied offenses.

In the present case, even if there are allied offenses involved, there is no prohibition imposed by either the Double Jeopardy Clause or its statutory embodiment, Ohio Revised Code Section 2941.25, against submission to the jury of all counts of a multiple-count indictment. The determination of whether allied offenses are involved is a legal determination based on the evidence. If guilt is found, then the Double Jeopardy protections, embodied in the allied offense statute, prevent multiple sentencing. Emphatically, the law in Ohio does not prohibit the prosecution from submitting multiple count indictment to a trier of fact. The allied offense statute comes into play only as a legal issue for the court to determine. Respondent is alone in his interpretation of the allied offense statute, for the Ohio courts have never held that the statute is anything more than a sentencing vehicle. The constitutional and common law foundations of the Double Jeopardy Clause provide the basis for the multiple-counts statute.

The respondent further contends that "regardless of this Court's decision on federal laws, the Ohio Court on remand would be free to adhere to its former judgment based on Ohio Revised Code Section 2941.25." Brief of Respondent, page 15.

Nothing could be further from the truth. If this case is remanded the people of Ohio must be entitled to at least one full and complete opportunity to try the Respondent. In the event of convictions of Murder and Aggravated Robbery, the Respondent's Double Jeopardy protection pursuant to Ohio Revised Code Section 2941.25 can be guaranteed by his exercise of the right afforded to him by Ohio Revised Code 2953.21 (Petition for Writ

of Certiorari, Appendix A-28), which allows an accused the right to petition the trial court to vacate or set aside a sentence.

If the Respondent voluntarily fails to avail himself of that right, he has waived his rights pursuant to the Double Jeopardy provisions and cannot complain of a constitutional violation.

Respondent cites *State v. Logan*, 60 Ohio St. 2d 126 (1979), for the proposition that the test of allied offenses of similar import is much broader and more inclusive than any test for the "same offense" with regard to the Double Jeopardy Clause. In actuality, the test used in *Logan* was nothing more than the *Blockburger* test. The words of the court make this abundantly clear:

> "We believe that prolonged restraint with asportation may be as penologically significant as substantial asportation and, under certain circumstances, will support a conviction for kidnapping as a separate act or animus from that of rape.
>
> Secret confinement, such as in an abandoned building or nontrafficked area, without the showing of any substantial asportation, may, in a given instance, also signify a separate animus and support a conviction for kidnapping apart from the commission of an underlying offense.
>
> *The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.* In the instant case, the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released

> immediately following the commission of the rape. In such circumstances, we cannot say that appellant had a separate animus to commit kidnapping." *State v. Logan*, at 135. (Emphasis added.)

Effectively the court is saying that Kidnapping and Rape are not allied offenses in some cases, but they are in this particular case because in proving the Rape count the State must, a priori, prove the Kidnapping count. The Kidnapping count in *Logan* did not require proof of any additional element which the Rape count did not include. Since the Kidnapping does not require proof of any additional facts which the Rape requires, the counts are allied offenses. Rather than broadening the Double Jeopardy Clause, the court is regarding the allied offenses statute as an embodiment of the Double Jeopardy Clause and doing nothing more than applying the *Blockburger* test.

In *Michigan v. Long*, 77 L. Ed. 2d 1201 (1983), this Court encountered an argument similar to Respondent's Argument. Long argued that Michigan courts had provided greater protection from searches and seizures under the state constitution than were afforded under the Fourteenth Amendment, and that therefore, there was an adequate and independent ground for the decision below. Respondent argues that because the allied offense statute broadens Double Jeopardy protections, there is an adequate and independent state ground for the decision. The argument fails in the present case for the following reasons.

The opinion of the Ohio Supreme Court is laden with references to the Double Jeopardy Clause and federal case law. As previously argued, the allied offense statute is referred to by the Court as "further effectuating the principles contained in the Double Jeopardy Clause." *State v. Johnson*, 6 Ohio St. 3d at 422. The second syllabus

expressly mentions the Double Jeopardy Clause which is, in fact, the cornerstone of the second syllabus.

Respondent's attempt to broaden the coverage of the Double Jeopardy Clause springs from an unsupported, unique approach to the law of Ohio. Coincidentally, the same approach failed in *Long*, as it should here. In *Long*, not a single state case was cited to support the State Court's holding that the search of a vehicle's passenger compartment was unconstitutional. The opinion of the Supreme Court of Ohio relies upon seven federal cases and the Double Jeopardy Clause. Only three state cases and statutes are cited. The three cases are: *State v. Thomas*, 61 Ohio St. 2d 254 which holds that the allied offense statute is the statutory embodiment of the Double Jeopardy Clause, *State v. Harris*, 58 Ohio St. 2d 257 and *State v. Logan*, 60 Ohio St. 2d 126, are also cited, but are nothing more than restatements of the *Blockburger* test. Because the state case law cited merely restates the Federal law, and because the state case law is utilized to interpret the allied offense statute, the conclusion is inescapable that the allied offense statute was read by the Ohio Supreme Court in light of federal law and there is no adequate independent state ground upon which the decision rests.

There being no adequate independent state ground for the decision below, dismissal of this case will not aid in the important task this Court faces in developing uniformity in federal law.

> "[O]utright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in Federal law, and this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the

> *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate where there is strong indication . . . the federal constitution as judicially construed controlled the decision below." *Minnesota v. National Tea Co.*, 309 U.S. 551, at 556; *Michigan v. Long*, 77 L. Ed. 2d 1201, at 1214.

In determining whether the Court has jurisdiction to review a case that allegedly rests on adequate state grounds, the Court will "assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the State court rested its decision primarily on Federal law." *Long*, 77 L. Ed. 2d, at 1215. The opinion of the Ohio Supreme Court rests on the Double Jeopardy Clause and federal common law. The only Ohio cases utilized are mere explications of federal law. The opinion itself provides that the allied offense statute further effectuated the Double Jeopardy Clause. Because the decision rests primarily on federal law and it is certainly unclear that the decision rests on adequate state grounds, consistent with *Long*, the Court should assume that there are no adequate state grounds and should review the case.

Finally, the Court in *Long* attempted to clarify the issue of jurisdiction to review state court opinions by requiring a plain statement that the decision below rested on an adequate and independent state ground. *Long*, at 1216. Otherwise,

> "when . . . a State court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reason-

able explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Long*, at 1214.

There is no plain statement that the decision below rested on an adequate and independent state ground, nor is there any plain statement in the decision that the federal cases were used only for the purpose of guidance and did not themselves compel the result that the Court reached. It is incumbent upon this Court to review the opinion of the Ohio Supreme Court which rests primarily on Federal grounds with no adequate independent state ground apparent from the four corners of the opinion.

II. The Double Jeopardy Clause of the United States Constitution Does Not Prohibit Trial of the Respondent on the Charges of Murder and Aggravated Robbery.

The Respondent in Section II of his brief argues that the Double Jeopardy Clause of the United States Constitution prohibits trial of the Respondent on the charges of Murder and Aggravated Robbery. The Respondent breaks this argument down into three sections titled A, B, and C.

The Respondent in Section A of his brief argues that Involuntary Manslaughter is a lesser included offense of Murder and he cites *State v. Wilkins*, 64 Ohio St. 2d 382 (1980), as authority for that argument. On page 19 of the Respondent's brief, he writes the following:

> . . . The Ohio Supreme Court held that one offense is, a lesser included of another if all three of the following tests were met:
>
> 1. One offense must be lesser in degree than the other,
> 2. The offense of the greater degree cannot be committed without the lesser offense also being committed, and
> 3. Some element of the greater is not required to prove the commission of the lesser.

Using these criteria, it is obvious that Involuntary Manslaughter is not necessarily a lesser included offense of Murder and that the Ohio Supreme Court erred in ruling that it is. In applying the criteria established by the Ohio Supreme Court in *Wilkins* to the case at bar, only one of the three requisites is met. The first criteria is that one offense must be lesser in degree than the other and, in fact, Involuntary Manslaughter is a lesser degree crime than Murder. But it is certainly unclear as to whether or not the other two requisites are met. The second criteria established in *Wilkins* is that the offense of the greater degree cannot be committed without the lesser offense also being committed. In this particular case it is not certain that during the perpetration of a Murder that the perpetrator must, in fact, commit a misdemeanor.

The Respondent criticizes the State of Ohio for not citing the specific misdemeanor upon which hinges the

charge of Involuntary Manslaughter. But, truly, the Respondent cannot criticize the State of Ohio since he could have determined the identity of the misdemeanor through normal discovery procedures. The Respondent could have asked for a Bill of Particulars or he could have asked for Discovery and, thereby demanded that the State of Ohio name the underlying misdemeanor. The Respondent chose not to do any of these. Instead the Respondent, lemming-like, rushed to plead "Guilty" to the crimes of his choice in a blatant attempt to avoid prosecution on the greater charges. He now asks this Court to agree with him that the commission of a Murder would unavoidably result in also committing the crimes of Felonious Assault, Assault, Menacing, or Discharging a Firearm within the city. This is nonsense, a Murder can be committed without, a priori, committing menacing or discharging a firearm in the City limits or various other misdemeanors.

The Respondent also fails to meet the criteria of Subparagraph 3 of *Wilkins*, which requires that some element of the greater offense is not required to prove the commission of the lesser. There is an element of Murder, namely a purposeful mental intent, which is not required to prove the Involuntary Manslaughter. But Involuntary Manslaughter also requires proof of the commission of a misdemeanor which Murder does not. Once again the Respondent is asking the Court to assume that there is a mental intent involved in the misdemeanor. This might have been a valid argument had the defendant taken the time to determine what misdemeanor was the basis of the Involuntary Manslaughter. But since he failed to do that, he cannot now claim that whatever misdemeanor was the basis of the manslaughter, certainly it must have had a mental intent requirement. The fact of the matter is that

Murder has a mental intent of "purposely". The mental intent of the Involuntary Manslaughter will rest upon the mental intent of the misdemeanor involved in Involuntary Manslaughter. And as the Petitioner has argued in his brief, there are misdemeanors in the State of Ohio that require no mental intent. The two offenses, therefore, have separate and independent elements, and Double Jeopardy does not bar their separate prosecutions.

For this reason, the present case is highly analogous to *Illinois v. Vitale*, 447 U.S. 410 (1980). Pursuant to *Vitale*, the "mere possibility that the State will seek to rely" on all the ingredients necessary to prove the Involuntary Manslaughter to establish an element of its Murder charge would not be sufficient to bar the prosecution on the charge of Murder. *Vitale*, 447 U.S. at 419.

The Respondent next argues in Section B of his second argument that "the collateral estoppel ingredient of the Double Jeopardy Clause prohibits further prosecution of the Respondent," Brief of Respondent, page 23. Respondent bases his argument principally upon *Ashe v. Swenson*, 397 U.S. 436 (1970). *Ashe*, is so factually distinguishable from the case at bar, that it is really inapplicable. This is not a question of collateral estoppel pursuant to *Ashe*. In *Ashe*, the defendant was indicted for several counts of robbery involving the robbery of several members of a card game. The State in that particular case chose to try the defendant one victim at a time. Unfortunately for the State in that case, the jury found the defendant "Not Guilty" on the first trial. This court ruled that since the ultimate fact of whether or not the defendant had perpetrated the robbery had been decided by a jury, then any further prosecution of the defendant concerning the other victims was prohibited by collateral estoppel.

Is it Respondent's contention that if the accused in *Ashe* had been convicted at the first trial that the State would have been precluded from trying him for the other victims? This seems a bizarre interpretation of *Ashe*. Although the Respondent argues . . . "there is nothing at all in the history of collateral estoppel to suggest that it only applies to acquittals," Brief of Respondent, page 25, certainly there is nothing in the history of collateral estoppel, at least nothing cited by the Respondent, that indicates that the issue of collateral estoppel would be applicable to the case at bar. There has been no litigation of any ultimate fact in this particular case.

The word "Litigate", as defined by BLACK'S LAW DICTIONARY (5th ed. 1979), page 841, means "to make the subject of a law suit; to contest in law; to prosecute or defend by pleadings, evidence, and debate in a court." There has been no debate or presentation of any evidence concerning any ultimate issues in this particular case. The defendant has voluntarily chosen to plead "Guilty" to the lesser crimes. He has done this in an obvious attempt to thwart justice and prevent the People from fully prosecuting him for the heinous and despicable acts that he has perpetrated upon Thomas Hill, and he now seeks to distort and pervert the principles of collateral estoppel and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution to suit his needs. Unfortunately for Respondent, he has not been able to cite any case which is specifically on point and which supports his argument that collateral estoppel prohibits further prosecution in this particular fact situation. Instead the Respondent wishes this Court to accept his own theory of what the law should be as being what the law is.

Surely collateral estoppel and the principles of Double Jeopardy were not intended to protect an accused in these

circumstances, a situation of his own creation, a situation in which the State of Ohio has not been accused of acting improperly, and in fact has not done so.

Respondent finally argues in section C of his second argument that "a trial now on Murder and Aggravated Robbery would put the Respondent 'twice' in jeopardy." Brief of Respondent, page 27. The Respondent in Argument C, argues as if being "twice" in jeopardy was an absolute bar to a continued prosecution. This is, in fact, not an accurate proposition. There are a number of situations in which continued prosecution is constitutionally permissible. A new trial is permitted following the defendant's successful appeal of his conviction, *United States v. Ball*, 163 U.S. at 672 (1896); where a mistrial has been declared from the manifest necessity caused by a military advance, *Wade v. Hunter*, 336 U.S. at 688 (1949); where the defendant has requested a mistrial in the absence of judicial or prosecutorial overreaching, *United States v. Dinitz*, 424 U.S. 600 (1976); or where an indictment is dismissed at the request of the defendant and in a situation functionally equivalent to a mistrial, *Lee v. United States*, 432 U.S. 23 (1977). Certainly continued prosecutions were proper in *United States v. Scott*, 437 U.S. 82 (1978) and *Jeffers v. United States*, 432 U.S. 137 (1977).

In the exceptions which allow continued, or second, prosecutions, the exceptions are based upon a common sense application of the intended protections of the Double Jeopardy provision in relation to the rights and interests of the people. Whether or not the Double Jeopardy provision prohibits a continued or second prosecution must be determined by that weighing and balancing test. In this particular case, the rights and interests of the Respondent must fail in relation to the rights and interests of the People in having one full and complete proceeding.

Respondent cites *United States v. Scott*, and argues that *Scott* is distinguishable from the case at bar because the two indictments dismissed in *Scott* were dismissed prior to an adjudication of guilt or innocence for those offenses. This is a difference without distinction. Scott was originally indicted on a three count narcotics indictment, and it was his voluntary acts in bifurcating the proceedings that permitted his second prosecution. Scott had moved both before and during the trial to dismiss two counts. He finally persuaded the court to do so at the close of the presentation of evidence. Two of the counts were dismissed and the defendant was found "Not Guilty" on the remaining count. Now the Respondent argues that *Scott* is distinguishable from the case at bar, and of course, factually, there are distinguishing features. But it was the defendant's conduct in *Scott* which is distinguishable, not the absence of a factual determination which permitted a continued prosecution or a second prosecution of Scott when a jury had found him "Not Guilty" of the first count.

The Respondent further argues that "Johnson, unlike Scott, sought termination because of, and after, a determination of his guilt." Brief of Respondent, page 28. This is a strained distinction. Scott, like Johnson, was doing his utmost to avoid being fully penalized for the crimes for which he had been accused. Scott sought to terminate the two counts of the indictment at every opportunity, before, during, and after the presentation of the evidence. Johnson, just like Scott, is attempting to avoid the determination of his guilt on two counts of an indictment and the fact that Johnson has chosen to approach the problem in a little different manner than Scott surely does not invalidate the principles established by this court in *Scott*.

The Defendant-Respondent's interpretation of *Jeffers v. United States,* is even more bizarre. He writes that "*Jeffers* is not controlling because it is a plurality opinion and the concurrence is based on solely different grounds that do not implicate the Fifth Amendment at all." Brief of Respondent, page 31 and 32.

It seems odd to argue that *Jeffers* does not implicate the Fifth Amendment, when, in fact, Jeffers, like Johnson, argued that the Double Jeopardy provision of the Fifth Amendment prohibited his continued prosecution. Four Supreme Court Justices ruled that the Double Jeopardy Clause did not prohibit further prosecution of Jeffers and they formed a majority because a fifth judge felt that *Ianelli v. United States,* 420 U.S. 458 (1973) was controlling, i.e. that even though the two charges may have been the same for Double Jeopardy purposes that Congress had indicated that cumulative sentences were in order. Certainly the four dissenting justices discussed the Double Jeopardy protections, and they felt that the Double Jeopardy provision protected Jeffers because they perceived that the government had acted improperly. It is redundant, but significant, to add that no one has accused Ohio of acting improperly in indicting Johnson in the manner in which it did.

Both *Scott* and *Jeffers* are highly analogous to the case at issue. They both involve defendants who were validly indicted and who sought to bifurcate and terminate portions of those valid indictments, and later claimed that Double Jeopardy protected them from the continued prosecution on those indictments. In both *Scott* and *Jeffers* it was the accused who voluntarily chose to bifurcate the proceedings. The Respondent argues that "*Johnson* pleaded 'Guilty' and never attempted to bifurcate two cases in which the issues were joined and trials pending." Brief

of Respondent, page 33. But this is, like most of his arguments, a strained contention. Certainly Johnson in this particular case pled "Guilty" with the intention of bifurcating this indictment. Johnson did not enter pleas of "Guilty" to Involuntary Manslaughter and Grand Theft because of feelings of remorse or concern about the murder of Thomas Hill. He pled "Guilty" to the crimes of his choice so that he could minimize the period of his incarceration. Everything, every act that Johnson has taken in these particular proceedings has screamed of bifurcation, of separating the counts of these indictments, one from the other, so that he could avoid the penalty of the greater offenses. It is this voluntary action on the part of the Defendant, coupled with a denial of the State of Ohio's right to one full and complete hearing that now relieves the Respondent of the protection of the Double Jeopardy Clause of the United States Constitution. The Respondent has in his brief, just as he has in his prior pleadings, sought to impose a hypertechnical and extremely rigid standard upon the courts of Ohio and now of the Federal Courts. Surely, the Double Jeopardy provision was not intended to protect an individual in this particular fact situation. It was not intended to emasculate the criminal prosecution of murderers and robbers.

CONCLUSION

For all the foregoing reasons the decision of the Ohio Supreme Court must be reversed and remanded so that the Respondent can be brought to trial and fully prosecuted for the acts he has committed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO, PETITIONER

v.

KENNETH M. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will discuss the following issue:

Whether the Double Jeopardy Clause prohibits a defendant from being tried on charges of murder and aggravated robbery after his guilty plea is accepted by the trial court, over the State's objection, to lesser included charges contained in the same indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-904

STATE OF OHIO, PETITIONER

v.

KENNETH M. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important issue regarding the double jeopardy consequences of a defendant's guilty plea to fewer than all counts of an indictment. Guilty pleas play a prominent role in the federal criminal justice system, and although this is a state case, the Court's decision will govern federal criminal cases as well. The United States therefore has a substantial interest in the outcome of the case.

STATEMENT

On February 13, 1979, a grand jury in Lake County, Ohio charged respondent, Kenneth M. Johnson, in a four-count indictment with murder, involuntary manslaughter, aggravated robbery, and grand theft in violation of Ohio Rev. Code Ann.

§§ 2903.02(A), 2903.04(B), 2911.01(A)(1) and 2913.02(A)(1) (Page 1982 & Supp. 1983). All four charges stemmed from the fatal shooting and robbery of Thomas Hill in Mentor, Ohio on January 25, 1979 (Pet. App. A2).

Following his apprehension in Tennessee and his return to Ohio, respondent was arraigned before the Court of Common Pleas of Lake County, Ohio, on October 9, 1980. At his arraignment, respondent offered to plead guilty to the charges of involuntary manslaughter and theft and to plead not guilty to the two more serious charges. Pet. App. A2. The State objected to the proffered guilty pleas, arguing that it had a right to have a trial on all of the charges in the indictment (Pet. 3-4).

The trial court held a hearing on November 26, 1980, at which, over the renewed objections of the State, it accepted respondent's guilty pleas. The court thereafter sentenced respondent to consecutive terms of three to ten years' imprisonment on the involuntary manslaughter charge and two to five years' imprisonment on the theft charge. Pet. App. A2. Subsequently, respondent filed a motion to dismiss the remaining charges against him on the ground that his right not to be placed twice in jeopardy for the same offense, as applied to the states through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784 (1969), would be violated if he were tried on those counts.

On March 31, 1981, the trial court granted respondent's motion (Pet. App. A21-A24). The court found that involuntary manslaughter was a lesser included offense of murder and that grand theft was a lesser included offense of aggravated robbery. It then reasoned that should the case "proceed to trial on the remaining charges and the factual evidence presented

is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated" (Pet. App. A23).

The State appealed, and the Court of Appeals of Lake County, Ohio, affirmed (Pet. App. A14-A18). Relying largely upon the opinion of the lower court, the court of appeals held that involuntary manslaughter and grand theft are lesser included offenses of murder and aggravated robbery, respectively, and therefore that trial on the greater offenses was barred by the pleas (*id.* at A18).

The Supreme Court of Ohio, with one judge dissenting, affirmed (Pet. App. A1-A12). The court agreed with the State that the case did not involve "successive prosecutions such as to warrant the application of the collateral estoppel principles set forth in *Ashe v. Swenson* (1970), 397 U.S. 436, and its progeny" (Pet. App. A4). The court found, however, that the double jeopardy principle prohibiting multiple punishments for the same offense supported the dismissal of the indictment.

The court reasoned that if respondent could not be punished separately for the various statutory offenses, then he could not be convicted on all of the charges "regardless of the timing of the trial court's acceptance of his pleas" (Pet. App. A4). Relying upon *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Brown* v. *Ohio*, 432 U.S. 161 (1977), and Ohio's multiple count statute,[1] the court concluded that for

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[1] That statute (Ohio Rev. Code Ann. § 2941.25(A) (Page 1982)) provides in pertinent part:

> Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import,

double jeopardy purposes the lesser offenses to which respondent had pleaded guilty were identical to the remaining charges. Since he had already been convicted of involuntary manslaughter and grand theft on his pleas, the court held that dismissal of the remaining counts was required by the Double Jeopardy Clause.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause affords a criminal defendant three principal protections: it bars a second prosecution after an acquittal; it bars a second prosecution after a conviction; and it bars multiple punishments for the same offense. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). On their face, none of these protections appears to apply to respondent's situation. Certainly, he has not been acquitted of anything. The acceptance of his guilty plea to the lesser offenses can in no way be regarded as a determination of his innocence of the greater offenses charged. *United States* v. *Scott*, 437 U.S. 82, 97 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Contrary to the reasoning of the court below, the presence of greater and lesser included offenses creates no inexorable multiple punishment problem. If respondent is convicted after trial on the greater charges, then under the Supreme Court of Ohio's view of the offenses, the punishments should be merged. That is no reason to forbid a trial on the remaining charges. See *Green* v. *United States*, 365 U.S. 301 (1961). Although it is true that double jeopardy bars prosecution for a greater offense following trial

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the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

and conviction for a lesser included offense, *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), that rule has no application here unless it can be said that what the State proposes by trying respondent on the greater charges is successive prosecutions. But that merely poses the question whether a trial on the greater offenses after a guilty plea to the lesser ones, as part of the resolution of charges contained in a single indictment, infringes a defendant's right not to be prosecuted after a conviction; it does not answer it.

A.

1. The protection against double jeopardy derives from the common law pleas of autrefois acquit and autrefois convict and principally serves the same function in criminal law as res judicata and collateral estoppel do in civil law—protecting the defendant's right and society's interest in finality once judgment has been reached in a dispute. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Here, if the State had indicted respondent on charges of involuntary manslaughter and grand theft and he had pleaded guilty and been sentenced on those charges, the matter would be properly regarded as closed, so that a subsequent attempt by the State to prosecute on the greater charges would be barred under *Brown* v. *Ohio*, *supra*.

What is missing in this case is the final resolution of the entire dispute between the parties. Res judicata and collateral estoppel bar relitigation only when the first litigation has been completed. Since this case is still at the pretrial stage, double jeopardy's protection of the criminal defendant should be no greater than res judicata's protection of a civil defendant. If this were a civil suit, respondent's proposal to settle half of the case clearly would not

end the litigation; trial would proceed on the remaining counts. In short, respondent may have been convicted, but not "autrefois," which means on *another* occasion.

2. The determination of when an individual defendant has been subjected by state court proceedings to a prior jeopardy sufficient to bar a further prosecution of the government's charges does not depend on the technical form of the state's process. See *Swisher* v. *Brady*, 438 U.S. 204 (1978). Thus, the fact that the arraignment judge allowed respondent to plead separately to lesser included offenses in a preliminary proceeding should not bar his trial on the remaining portion of the case unless to do so would significantly undermine an interest guarded by the double jeopardy protection.

Allowing the single trial proposed by the State offends no double jeopardy policy. Respondent will not be subjected to any undue "embarrassment, expense or ordeal" by having pled guilty at an arraignment and then nevertheless having to face a single trial later. *Green* v. *United States*, 355 U.S. 184 (1957). Nor does the policy of "finality" based on the prior judgment entered on the pleas justify barring a trial. A pretrial disposition never creates more than a unilateral hope in the defendant that the case will end; it engenders no legitimate expectation protected by double jeopardy that the case will never proceed to trial. See *Serfass* v. *United States*, 420 U.S. 377 (1975).

The only "right" that is jeopardized by the Ohio proceedings is the State's right to a full and fair opportunity to prosecute respondent for the serious crimes with which he is charged. If this were a federal prosecution, we would urge the Court to va-

cate the plea as beyond the power of a federal court to accept over the government's objection and to remand for trial on the original indictment. Trial would be permissible just as in any other case in which the district court has erroneously dismissed charges prior to trial. *Serfass* v. *United States*, *supra*. Indeed, even a dismissal that occurred as the result of a midtrial plea to a lesser offense, made at the defendant's behest and over the prosecution's objection, would be reviewable, and retrial permissible, under *United States* v. *Scott*, 437 U.S. 82 (1978). We can see no reason under the Double Jeopardy Clause or logic why the result should be different simply because the guilty plea to the lesser included offenses remains in effect.

B.

If we are mistaken in our position that the proceeding should be viewed as a single occasion of jeopardy, respondent nevertheless is not immunized from trial, because he alone was responsible for this case being conducted in separate phases. "[A]lthough a defendant is normally entitled to have charges on a greater and lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (footnote omitted). Here, the State has done everything it could to have this entire transaction disposed of in a single proceeding; it was respondent who voluntarily chose to have the case handled in two stages. The Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice," *United States* v. *Scott*, 437 U.S. at 99,

and therefore the State should be permitted to proceed to trial on the remaining counts of the indictment.

ARGUMENT

As this Court has repeatedly stated, the Double Jeopardy Clause affords a criminal defendant three principal protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). See also *Illinois* v. *Vitale*, 447 U.S. 410 (1980); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977); *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). In order properly to resolve the issue posed in this case, it is necessary first to determine which of the double jeopardy protections is implicated by acceptance of a guilty plea to some charges, followed by a trial on other, greater offenses charged in the same indictment.

The first protection obviously has no application here; there has been no acquittal, actual or implied. The only actual judgment was a conviction based on respondent's guilty plea, and, as the federal courts of appeals have consistently held, the acceptance of a plea to a lesser included offense cannot be deemed an implied acquittal of the greater offense within the meaning of cases such as *Price* v. *Georgia*, 398 U.S. 323, 329 (1970), and *Green* v. *United States*, 355 U.S. 184, 191 (1957). See *United States* v. *Cruz*, 709 F.2d 111, 114 (1st Cir. 1983) ("[a]cceptance of a guilty plea to a lesser offense carries no implied acquittal of the greater offense and for this reason

is not the same as a verdict"); *United States* v. *Vaughan*, 715 F.2d 1373, 1375 (9th Cir. 1983); *United States* v. *Barker*, 681 F.2d 589, 591-592 (9th Cir. 1982); *Klobuchir* v. *Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk* v. *Berkemer*, 610 F.2d 445, 447 (6th Cir. 1979); *United States* v. *Johnson*, 537 F.2d 1170, 1174 (4th Cir. 1976); *United States* v. *Williams*, 534 F.2d 119, 121-122 (8th Cir.), cert. denied, 429 U.S. 894 (1976). While a trial court must inquire into the factual basis for a defendant's proffered guilty plea, that inquiry focuses exclusively on the elements of the crime that is the subject of the plea and sheds no light on the defendant's guilt or innocence of any other charges containing additional or different elements. Thus, the lower court decisions constitute a straightforward application of this Court's holding in *United States* v. *Scott*, 437 U.S. 82, 97 (1978) (brackets in original) (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)), that "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " It is thus clear that respondent has no double jeopardy claim based on his right not to be tried again after an acquittal.

The Supreme Court of Ohio concluded that *Pearce*'s third prong, the protection against multiple punishments, was the relevant concern in this case (Pet. App. A4). This conclusion is, we submit, manifestly incorrect. Respondent has received no multiple punishments for a single offense. He has not been, and indeed he may never be, convicted of the greater offenses charged in his indictment. In the event he is convicted on the murder and aggravated robbery

charges, it would appear from the opinion below that the penalty for the lesser offenses would merge and thereby bar the State from imposing consecutive sentences.[2] But this is certainly no basis for holding that the State cannot try respondent on multiple charges in the same indictment. See *Green* v. *United States*, 365 U.S. 301, 306 (1961) (entry of lesser punishment before entry of greater in same case does not limit defendant's sentence to the lesser).[3] "Where

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[2] The construction of state statutes regarding lesser included offenses is a matter generally left to the state courts. See, *e.g.*, *Illinois* v. *Vitale*, 447 U.S. at 416-417; *Brown* v. *Ohio*, 432 U.S. at 167. The Supreme Court of Ohio ruled in this case that the state offense of theft is a lesser included offense of the crime of aggravated robbery (Pet. App. A7). It is not altogether clear from the court's opinion, however, what the precise relationship is between the State's statutes prohibiting murder and involuntary manslaughter. The federal crime of involuntary manslaughter (18 U.S.C. 1112) is a lesser included offense of murder (18 U.S.C. 1111). See *United States* v. *Lincoln*, 630 F.2d 1313, 1320 (8th Cir. 1980); *United States* v. *Hendrix*, 542 F.2d 879, 883 (2d Cir. 1976), cert. denied, 430 U.S. 959 (1977). The court below stated without explanation, however, that involuntary manslaughter in Ohio requires a mental state inconsistent with that required to prove murder (Pet. App. A8-A9). Under that theory, involuntary manslaughter may not be a lesser included offense of murder, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), although a second prosecution after a conviction on one of the charges still would appear to be barred on collateral estoppel principles. See *Brown* v. *Ohio*, 432 U.S. at 166-167 n.6. In any event, we take no position on the State's contention (Pet. 14-15) that the two offenses do not bear the relationship of greater and lesser included.

[3] The Ohio multiple count statute, Ohio Rev. Code Ann. § 2941.25 (Page 1982), forbids two convictions for "allied offenses," but expressly allows the State to charge two such offenses. Thus, no problem should arise unless and until con-

consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U.S. at 165; see *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983), slip op. 9; *Gore* v. *United States*, 357 U.S. 386, 392-393 (1958). Thus, respondent's right to be free from multiple punishments is simply not ripe for consideration at this time. Should he be convicted of murder and/or aggravated robbery, his right against multiple punishments can be fully protected by review of the sentences he receives.

In analyzing the issue in terms of multiple punishments, perhaps the court below thought it was applying this Court's statement that "[i]f two offenses are the same under [the *Blockburger* test] for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Brown* v. *Ohio*, 432 U.S. at 166. See also *In re Nielsen*, 131 U.S. 176, 187-188 (1889). The problem with reliance on this principle in the present circumstances is that it is unresponsive to the question it is invoked to decide—whether a trial on the greater offense is a successive prosecution after a guilty plea to the lesser charge contained in the same indictment. Thus, the statement in *Brown* merely poses the problem; it does not answer it. It does, however, bring us to the only part of the Double Jeopardy Clause that can have any arguable relevance to this case, the prohibition against successive prosecutions.

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victions are obtained for both offenses; at that point, the conviction on the lesser allied offense could be vacated, if appropriate, thereby fully protecting respondent's rights under the statute.

A. The Double Jeopardy Prohibition Against Successive Prosecutions Would Not Be Violated In This Case, Because Trial On The Remaining Charges Will Complete A Single, Continuing Prosecution

1. At bottom, double jeopardy is principally a rule of finality; it constitutionalizes for criminal cases the civil law's principles of res judicata and collateral estoppel. See *Ashe* v. *Swenson*, 397 U.S. 436, 449 (1970).[4] Like res judicata in civil cases, double jeopardy saves the criminal defendant from continued distress caused by attempts to relitigate previously resolved charges and enables both the defendant and the state "to consider the matter closed and to plan ahead accordingly." Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 277 (1965). This guarantees that a prosecutor, dissatisfied with a criminal defendant's sentence, will not be able to retry the defendant in order to obtain a more "appropriate" sentence from a second judge (*id.* at 278).

These general policies of finality, derived from the common law pleas of autrefois acquit and autrefois convict, form the basis of the rule that the Double Jeopardy Clause prohibits a separate prosecution of a defendant for a greater offense after he has been convicted of a lesser included offense. *Brown* v. *Ohio*, *supra*. This Court has never considered whether that rule applies when a criminal defendant pleads guilty to the charges against him, rather than having stood trial, but there is no reason to doubt that it should.[5]

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[4] Because respondent relies on his *convictions* on lesser included offenses to bar trial on the greater, the collateral estoppel component of double jeopardy has no application to this case.

[5] An issue that may appear relevant to the proper disposition of this case, but which is in fact a red herring, is whether

A guilty plea to all charges in a criminal case, or to some charges with dismissal of others pursuant to a plea bargain, leads to a final judgment resolving the dispute between the litigants. Thereafter, under standard principles of res judicata, the defendant is entitled to consider the matter closed, and the prosecutor is properly barred from attempting to obtain another conviction on the same offense (including greater or lesser included variants) to the same extent as if the conviction had followed a trial. Thus, under *Brown* v. *Ohio*, *supra*, if respondent had been

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jeopardy attaches to a guilty plea. This Court has never faced the issue, although one lower federal court has stated that "[a]n impressive number of federal cases are nearly unanimous in holding that jeopardy attaches upon the court's acceptance of a guilty plea." *United States* v. *Cruz*, 709 F.2d at 112-113 & n.2 (citing cases). We have no quarrel with the holding in most of those cases that, except where the defendant has obtained vacation of the conviction based on the plea, a guilty plea to an offense should bar a subsequent prosecution for the same offense. Compare *United States* v. *Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980), with *United States* v. *Williams*, 534 F.2d 119, 121 (8th Cir.), cert. denied, 429 U.S. 894 (1976). One of the cases cited in *Cruz*, however, involved the situation presented here of a defendant pleading guilty to lesser included offenses and not guilty to greater offenses. See *United States* v. *Rocco*, 397 F. Supp. 655 (D. Mass. 1975). But the opinion in *Rocco* does not explain why, prior to trial and prior to any truly "final" judgment resolving the disputed issues, there is any basis for concluding that jeopardy attached to the greater charges in the indictment. Thus, the statement that jeopardy attaches to a guilty plea is almost certainly true for some purposes, but diverts attention in this case from what is important, which is that the estoppel effect of double jeopardy should be available to a defendant only when the entire dispute is either settled between the litigants or finally resolved after a trial on all of the disputed issues.

charged only with involuntary manslaughter and grand theft, and had pleaded guilty to those charges and been sentenced on them, respondent's interest in finality, protected by the Double Jeopardy Clause, would bar a subsequent effort to prosecute him for murder and aggravated robbery.

But the policy favoring "finality" cannot justify extending the rule of *Brown* v. *Ohio*, *supra*, against successive prosecutions to this case. Here, respondent offered through his proposed pleas to resolve only a portion of the entire case, and the State objected to disposing of *any* of the counts short of trial. Unlike in *Brown* or in the above hypothetical, there has been no resolution of all of the issues in dispute between the litigants in this case, and therefore no final judgment that could create a double jeopardy bar to proceeding with the unresolved portions of the case. See *G.&C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28 (1916).

In a civil suit arising out of a single transaction, if a plaintiff sought damages against the defendant in a complaint containing four counts and the defendant admitted liability on two counts with smaller potential liability, he could not thereby settle the litigation over the plaintiff's objection. Even if a separate judgment on the two counts were entered, it would not end the case, because the plaintiff would still be entitled to his day in court on the unresolved greater claims. There would simply be no final adjudication of the issues that could justify invoking res judicata to prevent the plaintiff from proceeding with the remainder of his case. Since, apart from the special treatment accorded acquittals, double jeopardy basically embodies the civil law's concepts of finality, there is no reason why the result should be any different

in a criminal case.[6] The defendant's double jeopardy interest in finality simply does not exist until the entire matter is settled to the mutual satisfaction of the parties or the case has actually been tried. Neither event occurred in this case, and therefore double jeopardy should not bar further proceedings on the issues that remain untried and unresolved.

2. Even assuming that traditional res judicata principles as to finality cannot be incorporated directly into double jeopardy analysis, we submit that under this Court's prior decisions the State's attempt to take this case to trial on the remaining charges would not impermissibly place respondent twice in jeopardy. We are willing to assume for purposes of this argument that jeopardy attached to respondent's guilty plea (but see note 5, *supra*), and therefore that the proposed further proceedings should be scrutinized to determine whether they create a risk of placing respondent twice in jeopardy. See *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973) (when jeopardy attaches "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars" a further trial); *Serfass* v. *United States*, 420 U.S. at 390 (same). Thus, the issue is whether the nature of the "two" proceedings to which respondent may be sub-

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[6] Double jeopardy also protects a defendant's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949); *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978). For this reason, the Court's double jeopardy doctrine has modified ordinary res judicata principles somewhat by deeming a case to be potentially "final" once a jury is sworn or evidence is taken in a bench trial. But no protected interest of the defendant is implicated by the arraignment process, and there is therefore no reason not to follow ordinary res judicata notions of finality in considering whether pretrial disposition of a part of the case bars further proceedings on the rest of it.

jected is such that a trial is merely a continuance of a single jeopardy or a prohibited attempt to place respondent twice in jeopardy. See *Swisher* v. *Brady*, 438 U.S. 204, 215 (1978).

The Court's decision in *Swisher*, upholding Maryland's juvenile court proceeding against a double jeopardy challenge, strongly indicates that, notwithstanding acceptance of the guilty pleas, Ohio's prosecution should be viewed as merely a single occasion of jeopardy. In *Swisher*, Maryland's juvenile court scheme provided for the use of masters in the initial phase of juvenile court proceedings. In a hearing before a master, the State would present its case by calling its witnesses and introducing documentary evidence, and the minor would present his defense. The master would then submit to the juvenile court judge his proposed findings of fact, conclusions of law, and recommendations. Both the State and the minor could file exceptions and elect review by the judge, either solely on the basis of the record made before the master or, if no one objected, on the basis of the record and supplemental evidence presented to the judge. The judge could accept, reject, or modify the master's proposed disposition, regardless of whether any party submitted exceptions.

This Court held that this type of two-stage proceeding was permissible, even though, unlike in this case, the first stage had resulted in what could arguably be characterized as an acquittal. Examining the purposes of the Double Jeopardy Clause's bar against successive prosecutions, the Court found that none was infringed. Because the State could present its evidence only once, in the hearing before the master, with supplemental evidence allowed only with the consent of the minor, the prosecution was not provided with "another opportunity to supply evidence which it failed to muster in the first proceeding."

Swisher, 438 U.S. at 215-216 (quoting *Burks* v. *United States*, 437 U.S. 1, 11 (1978)). Nor was the prosecutor allowed to enhance the risk of convicting an innocent defendant by taking the question of guilt to two separate factfinders. The juvenile court judge was empowered to accept, modify, or reject the master's proposals; the judge was thus the sole adjudicator (438 U.S. at 216). Finally, the Court found that the juvenile proceedings did not subject the defendant to the ordeal of a second trial, because whatever supplemental proceeding might be conducted by the judge was far more akin to post-trial legal arguments or briefing than to a full-blown second trial (*id.* at 216-217).

The "two-step" prosecution that respondent's guilty plea has caused in this case does no more violence to any of the purposes behind the Double Jeopardy Clause than Maryland's juvenile procedure. A trial on the remaining charges will not provide the prosecution with the forbidden "second crack" at supplying evidence it could not muster at a first trial, because there has been no trial at all and therefore no factual presentation by the State. Nor is the State attempting to take its case to a series of factfinders in order to enhance the possibility of a conviction. Respondent has admitted his guilt on two of the charges; the State is simply trying to resolve the remaining, contested charges by submitting them for the first time to a factfinder empowered to determine guilt or innocence. The State thereby seeks a fair opportunity to force respondent to "run the gauntlet" one time, and no more, for the serious crimes he is alleged to have committed. See *Green* v. *United States*, 355 U.S. at 190.

Indeed, allowing the single trial proposed by the State does not offend any double jeopardy policy recognized by this Court. The Court has repeatedly

stressed that the underlying purpose of barring *re*-trial is to protect the criminal defendant from the "embarrassment, expense and ordeal" of a second trial. *Green* v. *United States*, 355 U.S. at 187. See *United States* v. *DiFrancesco*, 449 U.S. 117, 128-129 (1980); *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *Serfass* v. *United States*, 420 U.S. at 387-388. Subjecting respondent to the single trial called for in the indictment handed down by the grand jury constitutes neither harassment nor repetitious litigation. *United States* v. *Goldman*, 352 F.2d 263, 266 (3d Cir. 1965). Nor did the hearings in connection with respondent's guilty plea impose any burdens or anxieties on him comparable to those associated with a trial, see *United States* v. *Cruz*, 709 F.2d at 114 ("the 'ordeal' of a Rule 11 proceeding is significantly different from the ordeal of trial"); and respondent did not suffer any risk of conviction at the guilty plea hearing on the charges to which he did not propose to plead guilty. In short, this case does not present an example of anything even remotely approaching the kind of governmental oppression that the Double Jeopardy Clause was intended to preclude. See *United States* v. *Scott*, 437 U.S. at 96, 99.[7]

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[7] As this Court summarized its holding in *Scott* (*Swisher* v. *Brady*, 438 U.S. at 218):

> In *Scott* we held that it is not all proceedings requiring the making of supplemental findings that are barred by the Double Jeopardy Clause, but only those that follow a previous trial ending in an acquittal; in a conviction either not reversed on appeal or reversed because of insufficient evidence, see *Burks* v. *United States*, *supra*; or in a mistrial ruling not prompted by "manifest necessity," see *Arizona* v. *Washington*, 434 U.S. 497 (1978).

In this case, there having been as yet no trial ending in either an acquittal, conviction, or mistrial, the continuation of the prosecution follows none of those occurrences.

Nor should the result be affected by the fact that a judgment was entered on the guilty pleas that was separate from the order dismissing the remaining counts. It is clear that the proper outcome of the double jeopardy issue should not turn on this "technicality." See *Serfass* v. *United States*, 420 U.S. at 391. Finality in pre-trial proceedings is simply not very meaningful. Respondent's stake in finality is, if anything, less than that of the defendant in *Serfass*, who received a final judgment on the merits dismissing the entire proceeding against him.[8] This Court nevertheless held that a trial was fully warranted if the dismissal was not justified. See also *United States* v. *Scott*, 437 U.S. at 96. Respondent's unilateral desire to end this proceeding without a trial is not a sufficient reason under the Double Jeopardy Clause to deprive the State of its opportunity to have its duly returned and as yet unresolved charges heard by a trier of fact.

Thus, no interest of respondent protected by double jeopardy policies is at stake here. On the other hand, if the prosecution is pretermitted at this point, one "right" will be violated—the public's vital right to "one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Indeed, if this were a federal prosecution, we would contend that the district court was

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[8] As we explained previously, finality does protect the defendant's right to consider the matter closed and begin to plan ahead. But where, as here, the defendant merely seeks to eliminate a portion of the case, he cannot reasonably anticipate that the matter is closed. If respondent anticipated the double jeopardy windfall that his plea might provide, he should not be allowed to use the timing of his motions to create the appearance of a final determination separate from the dismissal of the remaining charges. See *Jeffers* v. *United States*, *supra*.

utterly without power to accept respondent's guilty plea over the government's objection.[9] "[U]nder the Constitution, the government, as well as the defendant, has the right to insist upon a jury determination of those facts [alleged in the indictment]," and therefore "a plea to a lesser offense may not be tendered, and cannot be accepted by the court, unless the government consents." *United States* v. *Gray*, 448 F.2d 164, 168 (9th Cir. 1971), cert. denied, 405 U.S. 926 (1972) (granting a writ of mandamus reinstating the charges in the indictment). See *United States* v. *Olson*, 504 F.2d 1222, 1224-1225 (9th Cir. 1974) ("On the district attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute."). See also *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1976) (Burger, J.).

Thus, if a federal court had cut off the government's effort to prosecute a defendant in accordance with the grand jury's indictment, the resolution of the case we would propose would be simply to vacate the guilty plea and reinstate the full indictment.

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[9] We do not know whether the State of Ohio ordinarily allows its trial courts to accept guilty pleas to lesser included offenses without the prosecution's consent. The Supreme Court of Ohio did not address this question, although the dissent states (Pet. App. A11) that the pleas were "improperly" accepted. Obviously, if the State chose to, it could permit entry of guilty pleas to lesser offenses over the prosecution's objection and could also bar trials after the entry of such pleas as a matter of state law. But there is no reason why any such unique procedure for handling pleas to lesser included offenses should alter the appropriate disposition of this case under the Double Jeopardy Clause. See pages 21-22, *infra*.

Since jeopardy does not attach to a *vacated* plea entered prior to the swearing of the jury or the taking of evidence, see *Serfass* v. *United States*, 420 U.S. at 390-391, the "constitutional policies underpinning the Fifth Amendment's guarantee" are not implicated, and therefore there would be no bar to going forward with the full trial on all of the charges, including the lesser ones. *United States* v. *Jorn*, 400 U.S. 470, 480 (1970).

There is no apparent reason why the result should be any different for double jeopardy purposes simply because the State has no mechanism for vacating the guilty plea entered over its objection. Certainly, the defendant's interests are identical in both cases, as long as he cannot be subjected to multiple trials or punishments for the same offense. The only possible difficulty created by the existing guilty pleas, and it is really a due process and not a double jeopardy problem, is how the court should handle the lesser included offense issue if respondent goes to trial. See *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Keeble* v. *United States*, 412 U.S. 205 (1973). This was a concern to both the trial court and the court of appeals (Pet. App. A16, A23). But this problem can be eliminated by allowing respondent to withdraw his guilty pleas to the lesser offenses; alternatively, if the pleas are not withdrawn, respondent may nevertheless be permitted to elect whether the lesser included offenses should be submitted to the jury.[10] Either of these procedures will protect respondent from the risk

[10] No double jeopardy problem would arise from giving the lesser included offense instruction after respondent has pleaded guilty to those charges, since the decision to proceed in that way will have been respondent's. See *Jeffers* v. *United States*, 432 U.S. 137 (1977), and pages 23-27, *infra*.

of being convicted of the greater offense, even though the jury may have a reasonable doubt on the issue of intent, in order to avoid letting him go free if it believes he has committed some crime. See *Beck* v. *Alabama*, 447 U.S. at 634-635; *Keeble* v. *United States*, 412 U.S. at 212-213. Accordingly, the guilty plea presents no obstacle to conducting a fair trial on the remaining charges.

This Court has "disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. at 390 (quoting *Illinois* v. *Somerville*, 410 U.S. at 467). The holding that the entry of a guilty plea in the context of a single proceeding bars a trial furthers no policy of the Fifth Amendment and thus necessarily employs a "mere technicality" (420 U.S. at 391) as the sole basis for holding that respondent's rights have been violated. What this case involves is one episode, one indictment with four counts properly joined, a guilty plea to two counts, and a potential verdict on the others. There will be one trial, and noncumulative sentences. Respondent's trial should be viewed in its entirety as but a single occasion of jeopardy. *Green* v. *United States*, 355 U.S. at 187; *United States* v. *Combs*, 634 F.2d 1295, 1298, 1299 (10th Cir. 1980), cert. denied, 451 U.S. 913 (1981); cf. *People* v. *Tideman*, 57 Cal. 2d 574, 370 P.2d 1007, 21 Cal. Rptr. 207 (1962). Accordingly, the Double Jeopardy Clause does not bar the State from proceeding further with its prosecution.

B. Respondent's Double Jeopardy Right To Have Greater And Lesser Included Offenses Resolved In One Proceeding Has Not Been Violated, Because He Elected By His Guilty Pleas To Have The Charges Resolved In Two Stages

As we have previously acknowledged, the Double Jeopardy Clause ordinarily prohibits prosecution of a defendant for a greater offense after he has been convicted in a prior proceeding of a lesser included offense. *Brown* v. *Ohio*, *supra*. This rule is not, however, absolute.[11]

An important exception to this rule was recognized in *Jeffers* v. *United States*, *supra*, in which a plurality of the Court found no constitutional violation where the defendant was responsible for separate trials being held on greater and lesser included offenses. Thus, assuming contrary to our submission in the previous point that respondent's guilty pleas constitute "prior convictions" within the meaning of *Brown* v. *Ohio*, *supra*, double jeopardy still does not bar further proceedings in the present circumstances because respondent, and not the State, is responsible for the bifurcated nature of the proceedings. The facts of this case provide even stronger support than in *Jeffers* for a conclusion that no double jeopardy violation would result from separate resolution of the greater and lesser charges.

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[11] One recognized exception occurs when additional facts necessary to the greater crime either have not taken place at the time the prosecution for the lesser is begun, or have not been discovered despite the exercise of due diligence. *Jeffers* v. *United States*, 432 U.S. at 151-152; *Blackledge* v. *Perry*, 417 U.S. 21, 29 n.7 (1974); *Diaz* v. *United States*, 223 U.S. 442 (1912); *Ashe* v. *Swenson*, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring).

In *Jeffers*, a grand jury had returned two indictments against the defendant, one charging him and nine others with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and the other charging him alone with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. 848, by his supervisory role in the drug distribution ring. Jeffers and his co-defendants opposed the government's motion to consolidate the indictments for trial, and it was denied. Jeffers and his co-defendants were tried on the Section 846 conspiracy charge, and Jeffers was found guilty.

Jeffers then moved to dismiss the Section 848 indictment on the ground that the conspiracy conviction barred a subsequent trial on that charge, contending that the Section 846 conspiracy was a lesser included offense of the Section 848 continuing criminal enterprise. The district court denied this motion, and Jeffers was tried and convicted on the continuing criminal enterprise charge. This Court, assuming arguendo that Section 846 was indeed a lesser included offense of Section 848, nevertheless concluded that double jeopardy principles did not bar the second trial (432 U.S. at 152 (footnotes omitted)):

> [A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election.
>
> * * * [The defendant] was solely responsible for the successive prosecutions for the conspiracy offense and the continuing-criminal-enterprise offense. Under the circumstances, we hold that his

action deprived him of any right that he might have had against consecutive trials.

Here, just as in *Jeffers*, respondent was solely responsible for the need to resolve the charges against him in separate proceedings, and therefore his actions should preclude him from asserting any double jeopardy claim he might otherwise have had. But for respondent's decision to ask the trial court to accept his guilty pleas to the two less serious charges, he would have faced but one trial on the entire indictment, as the State urged in resisting his guilty pleas.

Indeed, two significant facts in this case make it even more appropriate than in *Jeffers* to reject the double jeopardy claim. Although the *Jeffers* plurality found that the prosecution was not responsible for the separate trial of the greater and lesser offenses, it had, as the dissent pointed out (432 U.S. at 159-160 (Stevens, J.)), chosen to return separate indictments and to try the lesser offense before the greater when its effort at consolidation failed. In the instant case, by contrast, the State was proceeding on a single indictment, so that from the outset of the prosecution there was never any reason to expect other than a single proceeding, nor was there any basis for the defendant to oppose a single trial. Furthermore, unlike Jeffers, who did undergo two trials (see *id.* at 159 n.5 (Stevens, J.)), respondent will undergo "successive prosecutions," if at all, only in the sense that the entry of his guilty pleas and later trial are somehow technically considered separate proceedings. At the completion of the contemplated proceedings against him, however, he will have undergone only one trial.

Nor can *Jeffers* be limited to the relatively unusual circumstance involved in that case, where the defendant expressly asked for two separate trials on the

two offenses and convinced the trial court to allow them. This Court has consistently held that whenever the defendant is the moving force before the trial court in creating the need for some additional proceedings, after jeopardy has attached, the government is not, absent oppressive conduct by the prosecutor, barred from completing its prosecution.[12] Thus, in *United States* v. *Scott*, *supra*, the Court held that a retrial would be permissible when the defendant had moved during trial to dismiss his prosecution for pre-indictment delay. The Court concluded "that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice" (437 U.S. at 99). It seems clear from *Scott* that if the plea and attendant dismissal had occurred in the middle of trial, appeal and retrial would be permissible without violating the Double Jeopardy Clause. The fact that both events preceded the start of any trial in this case could hardly afford respondent greater rights.

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[12] The only possibly "oppressive" action in this case—and it seems to us exceedingly farfetched to so characterize it—is the grand jury's decision to include separate counts in the indictment. This practice has been cited in double jeopardy cases to justify allowing the defendant to plead to the lesser offense and thereby bar further trial. See *United States* v. *Combs*, 634 F.2d at 1303 (McKay, J., dissenting); *United States* v. *Rocco*, 397 F. Supp. 655 (D. Mass. 1975). But both Ohio's rules, Ohio Rev. Code Ann. § 2941.25 (Page 1982) and Fed. R. Crim. P. 8(a) allow separate offenses to be listed in separate counts. We fail to see how the practice could prejudice a defendant in any way, and thus it makes no sense to rely upon the form of the indictment as the basis for deciding when a retrial is permissible. See *Jeffers* v. *United States*, 432 U.S. at 153 n.20.

Similarly, in *United States* v. *Dinitz*, 424 U.S. 600 (1976), the Court allowed retrial after defense counsel's conduct had caused the trial court to remove him, and the defendant agreed to a mistrial in order to obtain new counsel. The Court held that double jeopardy was not violated because "the defendant retain[ed] primary control over the course to be followed * * *" (424 U.S. at 609); cf. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982); *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). Respondent voluntarily chose to create two separate "proceedings" by pleading guilty to two counts instead of either pleading guilty to all counts or going to trial on all of them. If allowing the State one trial on the murder and robbery charges is deemed to subject him to a second jeopardy, it is a problem of respondent's own making. Particularly since it seems quite clear that the guilty pleas were a conscious stratagem to create a potential double jeopardy impediment to prosecution on the more serious charges leveled against respondent,[18] it offends fundamental concepts of justice to hold the State barred from trying respondent even once.

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[18] At the arraignment hearing, the judge told respondent's counsel that he wondered "what problems [respondent] is creating for himself by entering a plea at this time" (10/9/80 Arraignment Tr. 5). Respondent's counsel assured the judge "that [the plea] has been carefully thought out (*ibid.*) and informed the court that "if the State were to proceed on the prosecution of the other two counts as I am sure they would, the [respondent] would have certain matters to bring to the Court's attention" (*id.* at 5-6). The State's attorney understood the import of respondent's counsel's comment, and immediately objected to the acceptance of the pleas because they might create "double jeopardy problems if the State chooses to prosecute [respondent on the greater offenses]" (*id.* at 6).

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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MARCH 1984

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No. 83-904-CSY
Status: GRANTED

Title: Ohio, Petitioner
v.
Kenneth M. Johnson

Docketed:
November 28, 1983

Court: Supreme Court of Ohio

Counsel for petitioner: Shoop, John E.

Counsel for respondent: Purola, Albert L.

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1983		Application for extension of time to file petition and order granting same until November 29, 1983 (O'Connor, October 18, 1983).
2	Nov 28 1983	G	Petition for writ of certiorari filed.
3	Dec 30 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Dec 30 1983		Brief of respondent Kenneth M. Johnson in opposition filed.
5	Jan 4 1984		DISTRIBUTED. January 20, 1984
6	Jan 16 1984	X	Reply brief of petitioner Ohio filed.
7	Jan 23 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jan 23 1984		Petition GRANTED.
			**********
9	Feb 3 1984	G	Motion of respondent for appointment of counsel filed.
10	Feb 10 1984		DISTRIBUTED. February 17, 1984. (Above motion).
11	Feb 21 1984		Motion for appointment of counsel GRANTED and it is ordered that Albert L. Purola, Esquire, of Willoughby, Ohio, is appointed to serve as counsel for the respondent in this case.
12	Mar 9 1984		Brief of petitioner Ohio filed.
13	Mar 9 1984		Joint appendix filed.
14	Mar 9 1984		Brief amicus curiae of United States filed.
15	Mar 16 1984		Record filed.
16	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 25, 1984. (3rd case)
17	Apr 3 1984		CIRCULATED.
18	Apr 3 1984	X	Brief of respondent Kenneth M. Johnson filed.
19	Apr 18 1984	X	Reply brief of petitioner Ohio filed.